91- 901

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MADERO DEVELOPMENT AND CONSTRUCTION COMPANY, INC., a Texas Corporation, and CHAPARRAL EQUITY CORPORATION, a Texas Corporation,
Petitioners,

v

CITY OF EL PASO, TEXAS, a Municipal Corporation, and CITY PLAN COMMISSION,
Respondents.

On Petition for Writ of Certiorari to The Court of Appeals of Texas, Eighth District, El Paso, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When a landowner has successfully shown that through regulations effecting density, a land use regulator has deprived the owner of all economically viable use of his property and therefore destroyed the owner's reasonable, investment-backed expectations, without compensation in violation of the 5th Amendment to the United States Constitution, is it consistent with prior decisions of this Court to:

   A. Hold that in order for such case to be "ripe" for judicial review, the landowner must first attempt to obtain a variance in the density restrictions from the land use regulator when the regulator has no authority to grant such a variance?

   B. Hold that the "ripeness" requirement of justiciability can never be satisfied unless the land owner attempts to obtain a variance?

   C. Fail to consider the non-jurisdictional, "prudential", aspects of ripeness?

2. Is it consistent with prior decisions of this Court for lower courts to determine whether it wuld be futile for the landowner to seek variance based upon a rigid application of the *Williamson* variance requirement without regard to whether such variance could in fact be granted?

3. Is it consistent with this Court's hold in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (U.S. 1987), wherein it was held that all takings, includin, temporary ones, require the payment of just compensation; to require a property owner to seek a variance before being entitled to the payment of compensation?

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PETITION FOR WRIT OF CERTIORARI

The Petitioners MADERO DEVELOPMENT AND CONSTRUCTION COMPANY, INC. ("Madero") and CHAPARRAL EQUITY CORPORATION ("Chaparral Equity"), respectfully pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Texas entered June 19, 1991.

OPINIONS BELOW

The Order of the Supreme Court of Texas denying Petitioners' Motion for Rehearing (Appendix B) is reported at 34 Tex. Sup. Ct. J. 36. The Opinion of the Court of Appeals, Eight District of Texas (Appendix A) is reported at 803 S.W.2d 396. The Judgment of the 243rd Judicial District Court of El Paso County, Texas appears in Appendix C.

JURISDICTION

This case involved a regulatory taking of approximately 33 acres of undeveloped land known as Madero Hills. Following over 15 years of Petitioners' attempts to develop Madero Hills, the City of El Paso voted to include Madero Hills in the Planned Mountain Development ("PMD") zoning ordinance effectively depriving Petitioners of all economically viable use of such property.

Petitioners instituted inverse condemnation proceedings in Federal district court alleging, among other things, that the actions of the City of El Paso in including Madero Hills in the PMD were unconstitutional in that such actions deprived Petitioners of their property without compensation in violation of the 5th and 14th Amendments to the United States Constitution. On December 21, 1988, the Federal district court granted the City of El Paso's Motion for Summary Judgment dismissing Petitioners' claims as unripe. In January, 1989, Petitioners refiled their action in state district court and on August 2, 1989, following a two week jury trial, the trial court granted judgment for Petitioners and awarded Petitioners $871,200 in damages. On January 4, 1991, the Court of Appeals for the Eighth District, El Paso, Texas reversed the judgment of the trial court and dismissed Petitioners claims as unripe. Petitioners' Application for Writ of Error to the Texas Supreme Court was denied on June 19, 1991. On September 5, 1991, the Texas Supreme Court denied Petitioners' Motion for Rehearing. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amednment to the United States Constitution provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or prosperty, without due process of law * * *

Pertinent provisions of the City of El Paso Ordinances and Texas Local Government Code are attached hereto as Exhibits "D" and "E" respectively.

STATEMENT OF THE CASE

Richard G. Miller, principal stockholder of Chaparral Equity, purchased approximately 100 acres of real estate known as "Crazy Cat Mountain" in the late 1960s. Crazy Cat is geologically described as the "Crazy Cat Landslide" which fell off the adjacent Franklin Mountains millions of years ago. The Franklin Mountain range lies within the El Paso City limits descending to the Rio Grande River creating the "Pass of the North." The purchased real estate and the surrounding developments were zoned R-3. Chaparral Equity initiated the Sierra Crest Subdivision development in 1975 by requesting

a rezoning to PUD-1, a planned unit development by special permit. Approximately 67 acres of the real estate tract located on the top and sides of the hill was rezoned and subsequently developed into streets and 113 single family lots.

Rolando Madero, principal stockholder of Madero Development and Construction Company, Inc., a Mexican born and educated engineer and architect, served as Mr. Miller's subdivision designer. With the assistance of his family, Mr. Madero purchased the remaining approximately 33 acres of Crazy Cat Mountain in 1979 with the intention of developing Madero Hills. Madero Hills lies on the identical slope as the above Sierra Crest Subdivision.

The R-3 zoning classification in the adjacent established Kern Place neighborhood permitted lots as small as 50 feet wide by 120 feet in depth. R-3 zoning classification permits a density of approximately 5.8 single-dwelling units per acre or a total of 174 lots for Madero Hills. Mr. Madero designed Madero Hills into 79 residential lots with a street running down the middle of the subdivision tract.

Mr. Madero over a period of five and one-half years spent considerable time, effort and money in filing for and obtaining the City of El Paso's approval of a master plan, preliminary approval of a four phase development, final approval of the first phase, and approval of a grading permit. During Mr. Madero's development efforts, it was not uncustomary for Respondents to change the rules or invent new obstacles not required of other developers. For instance, the final approval for the Unit One was granted subject to twenty-four conditions, many

of which had never been imposed on a residential subdivision in El Paso and would have been impossible to accomplish.

As early as 1982, the El Paso City Council decided to create a more restrictive mountainside zoning classification. Subdivisions under development, however, including Madero Hills would be exempt from this new classification. The new zoning classification was finally passed as Ordinance 8226 by the El Paso City Council on December 4, 1984, and was known as the Planned Mountain Development or "PMD." The stated purpose of the PMD was to directly correlate the density of the proposed development to the slope of the proposed development based upon two self-executing tables.

To circumvent the original planned exemption of Madero Hills from the PMD required a very deliberate scheme by which Respondents falsely terminated prior approvals and disseminated incorrect information. For instance, the planning department declared the grading permit revoked whereas the city engineer stated the permit was still active. Another example was that the cloth plat map had been submitted and signed by the city engineer but not distributed by the city personnel to the other city offices for processing. Ultimately, apparently feeling the pressures from adjacent land owners to preserve Madero Hills as a scenic easement, on January 14, 1986, the El Paso City Council passed Ordinance 8561 changing the Madero Hills zoning classification from R-3 to PMD over the objections of the Petitioners. City Council members and staff acknowledged that there was no consideration given to Petitioners' economic investment and reasonably invest-

ment backed expectations when Madero Hills was rezoned.

Following the inclusion of Madero Hills in the PMD, the city staff acknowledged that the slope of Madero Hills was forty-eight percent (48%) or an equivalent of a twenty-five degree (25°) angle. Through the self executing character of the PMD ordinance, the number of residential units capable of being developed on Madero Hills was reduced from 174 to seven multi-family dwellings units or 11 single-family dwelling units. It was not economically feasible to subdivide Madero Hills into only eleven lots.

Uncontroverted testimony and evidence in the lower court established that it would have been futile for the Petitioners to have received any further relief from the El Paso City Council. In addition to the clearly deliberate attempts to include Madero Hills into PMD, city council members testified regarding their expressed viewpoint that the city did not want anything on Madero Hills. Additionally, under the present statutory authority the Zoning Board of Adjustment ("ZBA") lacks the legal authority to change the expressed specific limitations of the PMD ordinance.

In January of 1989, Petitioners instituted this action against the City of El Paso and the City Zoning Commission (hereinafter sometimes collectively referred to as the "City of El Paso") in state court. Following a two week trial, the jury and the judge (independently) found that the City of El Paso had deprived Madero and Chaparral Equity of their property in violation of the Texas Constitution as well as the United States Constitution and awarded Petitioners $871,200 in damages.

The Court of Appeals reversed the trial court judgment and dismissed Petitioners' claims for want of jurisdiction on the basis of ripeness. In a two to one decision in which each justice wrote his own opinion, the Court of Appeals found:

1. Ripeness to be jurisdictional and not subject to waiver;
2. Petitioners' claims were not "ripe" for review because Petitioners had not sought a variance; and,
3. Petitioners could not invoke the "futility exception" without first seeking a variance.

On February 21, 1991, Petitioners filed their application for writ of error with the Texas Supreme Court. On June 19, 1991, such application was denied and on September 5, 1991 the Texas Supreme Court denied Petitioners' Motion for Rehearing.

REASONS FOR GRANTING THE PETITION

Introduction

Between 1981 and 1987, this Court decided several cases involving inverse condemnation.[1] These decisions, however, have not resolved many of the issues surrounding taking claims[2]. In *First English*[3], a case in which

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1. *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 101 S. Ct. 1287, 67 L.Ed.2d 551 (U.S. 1981); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (U.S. 1982); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S. Ct. 2862, 81 L.Ed.2d 815 (U.S. 1984); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (U.S. 1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285 (U.S. 1986); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L.Ed.2d 472 (U.S. 1987); *Hodel v. Irving*, 481 U.S. 704, 107 S. Ct. 2076, 95 L.Ed.2d 668 (U.S. 1987); *First English Evan-*

the property owner did not seek to obtain a variance from the land use restrictions prior to instituting an inverse condemnation action[4], this Court held that any taking, no matter how temporary, required conpensation to be paid to the property owner. In disregard to such ruling, lower courts, including the appellate court in the instant action, continue to dismiss claims as unripe where the property owner has not sought a variance.[5] No matter whether the regulation as a whole is ultimately invalidated as denying all reasonable use, or whether, through a variance, the regulation is invalidated as to a particular land owner; the fact that a taking has occurred in both situations mandates the payment of just compensation.

Additionally, in contrast to this Court's ad hoc factual resolution of ripeness, lower courts have adopted a mechanistic approach. In order to establish that his taking claim is ripe, lower courts require a property owner to

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gelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (U.S. 1987); *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (U.S. 1987).

2. As evidenced by the fact that in the present term, this Court has granted writ of certiorari in two inverse condemnation cases and in three eminent domain cases. *Yee v. City of Escondido,* 112 S. Ct. 294 (October 15, 1991); *PFZ Properties, Inc. v. Rodriguez,* 60 U.S.L.W. 3082 (Nov. 12, 1991); *Lucas v. South Carolina Coastal Council,* 60 U.S.L.W. 3208 (Nov. 18, 1991).

3. *First English Evangelical Luthern Church v. County of Los Angeles,* 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (U.S. 1987).

4. *See* Petition for Writ of Certiorari, *Lake Nacimiento Ranch Co. v. County of San Luis Obispo, California,* No. 87-2104, page 20.

5. *See Zibler v. Town of Moraga,* 692 F.Supp. 1195, 1197-1202 (N.D. Calif. 1988); *See also Shelter Creek Development Corp. v. City of Oxnard,* 838 F.2d 375 (9th Cir. 1988); *see also Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.,* 841 F.2d 872 (9th Cir. 1987); *see also Del Monte Dunes at Monterey, Ltd. v. County of Monterey,* 920 F.2d 1496, 1501 (9th Cir. 1990).

first have filed for and been rejected both a permit as well as variance application.[6]

Although this Court has never addressed the application of the futility exception, lower court's seem settled on the proposition that a property owner must first seek both a permit as well as a variance application before the futility exception can be invoked.[7] Such requirements destroy totally any viable use of the futility exception and mandate the futile act which the futility exception was created to avoid.

Finally, in addressing both the futility exception as well as ripeness, lower courts have consistently held ripeness to be jurisdictional and not subject to waiver.[8] Such holding is in stark contrast to the two prong ripeness test elaborated by this Court in *Abbott*.[9]

This case provides the unique opportunity for this Court to resolve all of the above stated inconsistencies

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6. *See Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988); *see also Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *opinion amended by*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043, 108 S. Ct. 775, 98 L.Ed.2d 861 (U.S. 1988); *see also Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988); *see also Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.*, 841 F.2d 872 (9th Cir. 1987).

7. *See Zibler v. Town of Moraga*, 692 F.Supp. at 1197-1202; *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *opinion amended by*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043, 108 S. Ct. 775, 98 L.Ed.2d 861 (U.S. 1988); *see also Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988); *see also Lake Nacimiento Ranch Co. v. San Luis Obispo City*, 841 F.2d 872 (9th Cir. 1987).

8. *See, e.g., Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991); *Sinola Lake Owners Association v. City of Simi Valley*, 846 F.2d 1475, 1480 (9th Cir. 1989); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 216 (3d Cir. 1988).

9. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L.Ed2d 681 (U.S. 1967).

and to provide the guidance both property owners as well as land use regulators need to effectively manage taking related issues.

WHETHER OR NOT A VARIANCE CAN BE OBTAINED IS IRRELEVANT TO THE DETERMINATION OF WHETHER A TAKING HAS OCCURRED

In *Williamson*[10] and *McDonald*[11], this Court refused to review taking claims on the basis that the property owner had an opportunity to obtain a variance from the the zoning authorities that would permit the development of the property to proceed. Implicit in these holdings was the assumption that the temporary deprivation of all use of property would not constitute a taking if it could be adequately remedied by a later approval of the developer's plans.[12]

Applying the perceived rational of *Williamson* that all taking claims were unripe without a property owner first seeking a variance from the land use restrictions, lower court's, in a majority of cases, have dismissed taking claims as being premature where such variance had not been sought.[13] In 1987, this Court rendered

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10. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (U.S. 1985).

11. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285 (U.S. 1986).

12. *See First English Evangelical Luthern Church v. County of Los Angeles*, 482 U.S. 304, 333, 107 S. Ct. 2378, 2396, 96 L.Ed.2d 250 (U.S. 1987) (Stevens, J., dissenting).

13. *See, e.g., Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir.), *cert. denied*, _____U.S._____, 112 S. Ct. 55 (U.S. 1991); *Unity Ventures v. County of Lake*, 841 F.2d 770

its decision in *First English* wherein it was held that temporary regulatory takings which deny a landowner all use of his property, are not different in kind from permanent takings for which the Constitution clearly requires compensation.[14]

In *First English,* the landowner did not seek to obtain a variance from the zoning authorities but instead proceeded to immediately institute an inverse condemnation action.[15] The temporary regulatory taking discussed in *First English* is in substance identical to that which is present in the case at bar.

Here, the interaction of the variance procedure and inverse condemnation procedure has the property owner chasing his own tail, so to speak, and never having a real opportunity for relief. The ZBA had jurisdiction to grant a variance only if application of the PMD zoning effected a taking.[16] But if the effect was already that severe, then, under *First English,* compensation was already owed. The only thing that any later governmental action could do would be to mitigate the damages by converting a permanent taking into a temporary one. Thus the appellate determination below, which held that

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(7th Cir. 1988); *Kinzli v. City of Santa Cruz,* 818 F.2d 1449, *opinion amended by,* 830 F.2d 968 (9th Cir. 1987), *cert. denied,* 484 U.S. 1043, 108 S. Ct. 775, 98 L.Ed.2d 861 (U.S. 1988); *Littlefield v. City of Afton,* 785 F.2d 596 (8th Cir. 1986).

14. *See First English,* 482 U.S. at 318, 107 S. Ct. at 2388.

15. *See* Petition for Writ of Certiorari, *Lake Nacimiento Ranch Co. v. County of San Luis Obispo, California,* No. 87-2104, page 20.

16. *See* Tex. Rev. Civ. Stat. Ann. art. 1011g now codified as Tex. Local Government Code § 211.009(a)(3) authorizes the ZBA to grant variances only where ". . . a literal enforcement of the ordinance would result in unnecessary hardship . . ."; *see also Board of Adjustment v. Willie,* 511 S.W.2d 591 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (art. 1011g requires denial of all reasonable use); El Paso Ordinance § 2.16.030 (1989).

the property owner had to go back to the ZBA for a variance before seeking compensation for a taking[17] which had already occurred is in irreconcileable conflict with *First English*. The question of whether a variance can be granted is simply irrelevant to the determination of whether a taking has occurred. It is only a mitigation measure.

From the moment Madero Hills was placed into the PMD, the City of El Paso unconstitutionally deprived Petitioners of their property. Once such taking had occurred, the City of El Paso retained the whole range of options already available—amendnment of the regulation, withdrawal of the invalidated regulation, of the exercise of eminent domain.[18] No subsequent action, however, by the City of El Paso can relieve it of the duty to provide compensation for the period during which the taking was effective.

LOWER COURTS HAVE IGNORED THIS COURT'S CAREFUL EXPLANATION OF THE "PRUDENTIAL" COMPONENT OF "RIPENESS" BY TAKING THE EASIER —AND ERRONEOUS—WAY OF TREATING ALL "RIPENESS" DECISIONS AS JURISDICTIONAL

This Court's decisions make it clear that ripeness is *not* automatically a jurisdictional issue.[19] Rather, this

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17. *City of El Paso v. Madero Development Corporation, et al.*, 803 S.W.2d 396 (Tex. App.—El Paso 1991, writ denied) (attached hereto at Appendix A).

18. *See First English*, 482 U.S. at 321, 107 S. Ct. at 2389.

19. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81, 98 S. Ct. 2620, 2635, 57 L.Ed.2d 595 (U.S. 1978); *see also Hotel Restaurant Employees Union v. Smith*, 846 F.2d 1499, 1516-1517 (D.C. Cir. 1988).

Court has held that the jursdictional component of ripeness is merely a narrow aspect of the doctrine. The more fundamental role of the ripeness doctrine is to determine whether cases, which are within lower court's jurisdiction to consider, ought to be considered for prudential reasons.

Lower courts, including the state appellate court herein, have consistently used the concept of ripeness to avoid making decisions on the merits in taking cases.[20] Such courts have routinely held ripeness to be jurisdictional and dismissed taking claims, sua sponte.[21] To justify "ripeness" as a jurisdictional concept, lower courts have, without exception, focused exclusively upon the *Williamson* finality requirement and ignored the policy considerations outlined by this Court in *Abbott*. The fact that ripeness includes both constitutional as well as policy or prudential considerations cannot be disputed. The prudential component of ripeness can be seen both in the futility exception to such requirement as well as in prior decisions of this Court.

Mootness, standing, ripeness and political question form the component parts to the Article III "case and controversy" constitutional doctrine of justiciability.[22] Although nonjusticiability is not to be confused with the lack of jurisdiction over the subject matter,[23] the distinction between the two concepts has often been blurred.[24]

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20. See cases cited *supra* notes 5, 6, 8, 14.

21. *See* cases cited *supra* note 8.

22. *See Poe v. Ullman*, 367 U.S. 497, 504, 81 S. Ct. 1752, 1756, 6 L.Ed.2d 989 (U.S. 1961); *see also El Paso Electric v. Federal Energy Regulatory Commission*, 667 F.2d 462, 466 (5th Cir. 1982).

23. *See Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed.2d 663 (U.S. 1962).

24. *See Mesolella v. City of Providence*, 508 A.2d 661, 665 (R.I. 1986).

Justiciability is a concept of uncertain meaning and scope.[25] This Court has previously stated that justiciability is not a legal concept with a fixed content or susceptible of scientific verification.[26] The doctrine has become a blend of the constitutional limitations imposed pursuant to Article III as well as restraints imposed based upon policy considerations.[27]

This Court has recognized that all the component parts to justiciability include both jurisdictional as well as prudential concerns.[28] Referring to mootness, it has been said that the prudential component ". . . is a melange of doctrines relating to the court's discretion in matters of remedy and judicial administration. Unlike Article III mootness, these doctrines address not the power to grant relief but the court's discretion in the exercise of that power."[29] Such concepts have been referred to as "prudential mootness"[30] and "prudential ripeness".[31]

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25. *See Flast v. Cohen*, 392 U.S. 83, 95, 88 S. Ct. 1942, 1950 20 L.Ed. 947 (U.S. 1968).

26. *See Poe v. Ullman*, 367 U.S. at 508.

27. *See Flast v. Cohen*, 392 U.S. at 97, 88 S. Ct. at 1951.

28. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S 59, 81, 98 S. Ct. 2620, 2635, 57 L.Ed.2d 595 (U.S. 1978) (prudential considerations embodied in ripeness); *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L.Ed.2d 556 (U.S. 1984) (standing includes prudential concerns); *United States v. W.T. Grant Co.*, 345 U.S. 629, 73 S. Ct. 894, 97 L.Ed. 1303 (U.S. 1953) (mootness includes prudential considerations).

29. *See Chamber of Commerce v. United States Dept. of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980).

30. *See City of New York v. Baker*, 878 F.2d 507, 509 (D.C. Cir. 1989).

31. *See Hotel Restaurant Employees Union v. Smith*, 846 F.2d 1499, 1516-1517 (D.C. Cir. 1988).

Both the constitutional as well as the policy or prudential considerations involved in ripeness were discussed in the leading "ripeness" case of *Abbott*.[32] In *Abbott*, this Court established a two prong test for determining whether a case was "ripe." First, the issues present must be fit for judicial decision.[33] The scope of this requirement is limited to the constitutional restraints imposed under Article III.

The second prong of the *Abbott* "ripeness" test focuses upon the hardships to the parties in withholding court consideration.[34] It is from this prong of the *Abbott* "ripeness" test from which the futility exception discussed by this Court in *Williamson* and *MacDonald* stems.[35] The futility exception is a creation of the prudential considerations outlined in the often quoted opinion of Justice

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32. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L.Ed.2d 681 (U.S. 1967).

33. *See Abbott*, 387 U.S. at 149, 87 S. Ct. at 1515.

34. *See Abbott*, 387 U.S. at 149, 87 S. Ct. at 1515.

35. Beginning in 1974, California courts, both Federal and State began discussing a "futility exception" to the exhaustion of administrative remedies doctrine. In *Dahl v. City of Palo Alto*, 372 F.Supp. 647, 649 (N.D. Calif. 1974), the court, in response to the argument that the property owner had failed to exhaust administrative remedies stated that "It is highly improbable that a variance would or legally could, be granted where as much land as here is involved (291 acres) and where development would be completely contrary to the goal of preserving land in its natural or near natural state. The Court will not require such a useless course." (Citations omitted).

The *Dahl* exception to exhaustion of administrative remedies was referred to as the "futility exception" in *People v. Superior Court of County of Sonoma*, 91 Cal. App. 3d 95, 101-102 (Cal. Ct. App. 1979). Although discussed in the context of exhaustion of administrative remedies, it is clear that policy considerations dictate the application of the futility exception both in ripeness as well as exhaustion of administration remedies.

Brandies occurring in *Ashwander v. Tennessee Valley Authority*.[36]

Without consideration of "prudential ripeness", lower courts have been able to fashion a bright line test for ripeness. If the land owner has not sought both a variance as well as permit application, the land owners claim of taking is not ripe and as is the case before the Court here, the land owners claim is dismissed for want of jurisdiction. Such test avoids any real consideration of the finality required by *Williamson* and is merely a re-statement of the exhaustion of administrative remedies test this Court held against in *Williamson*.

An analogous line of logic has been developed when considering the appellate court jurisdictional pre-requisite of finality contained within 28 U.S.C. § 1257. The finality requirement for appellate court jurisdiction, like the ripeness finality, has not been administered in a mechanistic fashion, rather at least 4 exceptions have been outlined by this Court in which finality does not have to be present.[37] These finality exceptions were created to avoid the "mischief of economic waste and of delayed justice."[38] Prudential or policy considerations such as these as well as those developed concerning ripeness cannot be jurisdictional.

Subject matter jurisdiction, the basis upon which the Court of Appeals reversed and rendered in this cause,

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36. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341-346, 56 S. Ct. 466, 482, 80 L.Ed. 688 (U.S. 1935).

37. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 95 S. t. 1029, 1037, 43 L.Ed.2d 328 (U.S. 1975).

38. *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 1478, 89 L.Ed. 2092 (U.S. 1945).

unlike the justiciable concern of ripeness, cannot be waived.[39] Subject matter jurisdiction exists when the nature of the case falls within a general category of cases the court is empowered to adjudicate under applicable statutory and constitutional provisions.[40] The question of subject matter jurisdiction is determined from the face of the plaintiff's pleadings.[41] It is intuitively obvious from the foregoing that while ripeness may be the yardstick by which courts determine whether to exercise their jurisdiction, ripeness is not and cannot be jurisdictional.

Basic to all jurisprudence is the idea that subject matter jurisdiction eithter exists or it does not exist. There is no gray area allowing trial courts to exercise subject matter jurisdiction when such jurisdiction is lacking. Ripeness, however, is determined by utilizing the two part *Abbott* test.[42] Ripeness, therefore, unlike jurisdiction, requires the court to exercise its discretion to determine if judicial resolution would be desirable.[43]

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39. *See Bowman v. Howell*, 618 S.W.2d 913 (Tex. App.—Fort Worth 1981, no writ).

40. *See Bullock v. Briggs*, 623 S.W.2d 508 (Tex. App.—Austin 1981, writ ref'd n.r.e.), *cert. denied*, 457 U.S. 1135, 102 S. Ct. 2962, 73 L.Ed.2d 1352 (U.S. 1982).

41. *See Elbar, Inc. v. Claussen*, 774 S.W.2d 45 (Tex. App.—Dallas 1989, no writ).

42. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149, 87 S. Ct. 1507, 18 L.Ed.2d 681 (U.S. 1967).

43. *See Brown v. Fero Corp.*, 763 F.2d 798 (6th Cir. 1985), *cert. denied*, 474 U.S. 947, 106 S. Ct. 344, 88 L.Ed.2d 291 (U.S. 1985).

LOWER COURTS CONTINUE TO APPLY AN EXHAUSTION OF ADMINISTRATIVE REMEDIES TEST TO DETERMINE RIPENESS AS A DEVICE FOR AVOIDING DECISIONS ON THE MERITS

Exhaustion of administrative remedies can be viewed conceptually as a horizontal gradient consisting of varying degrees of finality. At one end of the exhaustion gradient, a process of administrative review is initiated while at the other end, administrative review culminates in an authoritative decision. In a land use context, administrative review is initiated through commission hearings and culminates when an application for variance is denied.

If exhaustion of administrative remedies is viewed as a horizontal gradient, the *Williamson* finality requirement can be represented by a vertical vector intersecting such gradient. At any point along the horibontal exhaustion plane, ripeness can be satisfied and vertical court review initiated, provided that exhaustion has surpassed the *Williamson* finality threshold.

In order to determine whether a specific point along the horizontal exhaustion gradient has surpassed the *Williamson* finality threshold, courts must investigate the facts. Such investigation will determine whether or not further steps along the horizontal exhaustion gradient are necessary before a "final" decision has been obtained. Contrary to investigating facts, however, lower courts have resorted to a one dimensional analysis based simply upon determining what point the property owner has reached along the exhaustion gradient. If further ad-

ministrative review is possible, the property owner's taking claims are dismissed for want of jurisdiction.

This analysis practiced by lower courts is merely a re-application of the exhaustion doctrine this Court held against in *Williamson*. Jurisprudential concerns, such as those embodied in the exhaustion doctrine, do not bear on whether a court has jurisdiction but only upon whether it should exercise that jurisdiction.[44] The City of El Paso raised only the affirmative defense of exhaustion of administrative remedies in its pleadings and failed to urge lack of ripeness until this cause was on appeal.[45] The state appellate court, without any discussion of prudential ripeness, held ripeness to be jurisdictional and dismissed Petitioners' claims for want of jurisdiction. The continued re-application of the exhaustion doctrine by the state appellate court in this action as well as other lower courts is contrary to the holdings of this court.

MECHANISTIC APPLICATION OF FINALITY TEST RESULTS IN LAND OWNER BEING FORCED TO RESORT TO PIECEMEAL LITIGATION AND OTHER UNFAIR PROCEDURES

This Court has previously stated that the finality element of ripeness is to be applied in a "pragmatic way".[46] "Basically, the question in each case is whether the facts

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44. *See Association of National Advertisers, Inc. v. Federal Trade Commission*, 627 F.2d 1151, 1157 (D.C. Cir. 1979).

45. *City of El Paso v. Madero Development Corporation, et al.*, 803 S.W.2d 396 (Tex. App.—El Paso 1991, writ denied) (attached hereto at Appendix A).

46. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 1516, 18 L.Ed.2d 681 (U.S. 1967).

alleged, under all circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant" judicial intervention.[47] Thus, a regulatory action may be ripe for review notwithstanding the fact that such regulation has not been applied to anyone, if the expectation of such application causes cognizable injury.[48]

In contrast to this Court's clearly pragmatic approach to ripeness, lower courts, including the appellate court in the case at bar, continue to consider only the finality prong of the *Abbott* ripeness test and refuse to consider the hardships that would be imposed upon property owners as a result of such ruling. Petitioners' plight is similar to that experienced by the land owners in each of the leading taking cases decided by this court over the past decade. For 15 years, Petitioners sought to develop Madero Hills. Feeling the constant pressure exerted by adjacent land owners to preserve Madero Hills as a scenic easment or add to the Moutain Park land, the City of El Paso embarked upon a series of maneuvers each designed to preclude further development of Madero Hills. Ultimatly, the City enacted and placed Madero Hills into a PMD zoning ordinance, which through self executing density restrictions, reduced the maximum possible residential units on Madero Hills from 174 to 11. Development of Madero Hills at 11 residential units was not economically viable, therefor, the City had effectively preserved its easement without complying with the compensation requirements of the United States Constitution.

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47. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L.Ed. 826 (U.S. 1941).

48. *See Columbia Broadcasting Systems, Inc. v. United States*, 316 U.S. 407, 418-419, 62 S. Ct. 1194, 1200-1201, 86 L.Ed. 1563 (U.S. 1942).

Despite 15 years of attempted development, despite a clear expressed intent on the part of the City to preclude development, despite a deprivation of almost 2 million dollars in investment backed expectations, and despite the futility of any further attempts at development, the state appellate court held this matter to not be ripe. A land owner must ask himself how much he sacrifice and endure to retain the bundle of sticks the Constitution guarantees his land possesses.

After a two week trial, an El Paso jury found that Petitioners had been deprived their property without compensation in violation of the 5th Amendment to the United States Constitution. On appeal, the state appellate court, in often disjunctive and confusing opinion in which concepts of exhaustion of administrative remedies and ripeness were blended and misapplied, dismissed Petitioners' claims for lack of ripeness.

Seemingly following a recent trend in lower court decisions, the state appellate court held that a land owner must first attempt to obtain a variance from the land use regulation befor his taking claim can satisfy the *Williamson* finality requirement and prior to invoking the *MacDonald* futility exception. It is difficult to imagine what purpose is fulfilled in requiring a land owner to first seek to obtain that which cannot be granted in order to satisfy a ripeness requirement.[49] Yet, in some what of a bonanza

49. This Court expressly stated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (U.S. 1985) that "It appears that variances could have been granted to resolve at least five of the Commissioner's eight objections to the Plat". *Williamson* at 188. Additionaly, in *Williamson*, the zoning board of adjustment could grant variances from the density requirements. *See Id.* Resorting to mechanically applying the *Williamson* finality rule ignores the

for land use regulators, lower courts have now imposed such a requirement.

Recent taking decisions of this Court construing the ripeness requirement have fashioned as a shield to taking claims a defense of finality. This shield was premised upon the principles of justiciability, judicial economy and other constitutional prudential considerations. The shield, however, was not impenetrable. If further attempts at development would be futile, a land owner could immediately seek compensation.

The shield of finality, however, has now been transformed by lower courts into a mighty sword with which land use regulators can consistantly defeat even the most egregious of taking claims. Clearly, this Court did not intend to forge even more obstacles and barriers to taking claims through its decision in *Williamson*.

RESTRICTING APPLICATION OF FUTILITY EXCEPTION TO ONLY CASES WHERE BOTH PERMIT AND VARIANCE APPLICATION HAVE BEEN SOUGHT AND REJECTED, DESTROYS SUCH EXCEPTION

"Ripeness" can be satisfied by showing that a landowner's attempts at development would be futile.[50] This futility exception eliminates any reuirement that a landowner must resort to piecemeal litigation or otherwise unfair procedures in order to show finality.[51] Although this

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reason for the creation of such rule. If the land use regulators cannot grant the property owner any relief, then the reason for the creation of the *Williamson* finality rule has ceased; consequently, such rule should also cease.

50. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 n.7, 106 S. Ct. 2561, 91 L.Ed.2d 285 (U.S. 1986).

51. *See Id.*

Court has never addressed the application of the futility exception, lower court's have all but curtailed any possible application. While the U.S. Claims Court has taken a pragmatic view of this issue, insisting on a close examination of the facts and governmental demonstration of what else a property owner could *meaningfully* do to "finalize" a decision,[52] many other courts treat the issue as a talismanic one. These latter courts arbitrarily require all property owners to jump through identical hoops, regardless of whether they offer any real opportunity at relief.[53] This judicially created paradox mandates the precise conduct the futility exception was created to avoid.[54]

In the opinion below, the State appellate court adopted the futility exception paradox. Such requirement totally contradicts the essence of the futility exception as embodied in the prior decisions of this Court.The lower court's holding that this case was not ripe was predicated solely on the basis that Petitioners were obligated to seek a variance which may have increased the density of lots permitted, thereby identifying the "degree of taking" for damage calculations. While pursuit of a variance may be required in some cases, there is no obligation to seek a variance where relief cannot be granted.[55] Uncontroverted testi-

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52. *See Florida Rock Canyon Indus., Inc. v. United States,* 21 Cl. Ct. 161 (Cl. Ct. 1990); *Formanek v. United States,* 18 Cl. Ct. 785 (Cl. Ct. 1989); *Beure-Co. v. United States,* 16 Cl. Ct. 42 (Cl. Ct. 1988); *Loveladies Harbor, Inc. v. United States,* 15 Cl. Ct. 381 (Cl. Ct. 1988).

53. *See Zibler v. Town of Moraga,* 692 F.Supp. 1195, 1197-1202 (N.D. Calif. 1988).

54. *See Berger, The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers,* Ch. 7, Southwest Legal Foundation Institute of Planning, Zoning, and Eminent Domain 21st Annual Meeting (1991).

55. *See Herrington v. County of Sonoma,* 857 F.2d 567, 570 n.2 (9th Cir. 1988), *cert. denied,* 489 U.S. 1090, 109 S. Ct. 1557, 103 L.Ed.2d 860 (U.S. 1989).

mony and evidence in the lower court established that it would have been futile for the Petitioners to have received any further relief from the El Paso City Council. In addition to the clearly deliberate attempts to include Madero Hills into PMD, city council members testified regarding their expressed viewpoint that the city did not want anything on Madero Hills. Once such a clear and "final signal" announcing the views of the City of El Paso towards further development on Madero Hills had been received, further development efforts by Petitioners would have been futile.[56] The law does not require a litigant to do a vain or useless thing.[57]

There is no need to exhaust administrative remedies where the statute on its face cannot grant the relief requested.[58] The ZBA cannot grant a variance if the only hardship shown is financial.[59] Additionally, there is no authority for the ZBA to grant a bulk variance for a whole development, a concept which has been referred to as "de facto rezoning."[60]

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56. In *Hoehne v. County of San Benito*, 870 F.2d 529, 535 (9th Cir. 1989), the Ninth Circuit expressly found futility based upon, as is the case in the instant action, testimony regarding the attitude of zoning authorities against further development as well as rezoning in response to development applications. The appellate court decision in this case is in conflict with *Hoehne* as well as this Court's pragmatic approach regarding ripeness and futility.

57. *Dahl v. City of Palo Alto*, 372 F.Supp. 647, 649 (N.D. Calif. 1974).

58. *See Weinberger v. Weisenfeld*, 420 U.S. 636, 641, 95 S. Ct. 1225, 1229-1230, 43 L.Ed.2d 514 (U.S. 1975); *see also Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172 (Fed. Cir. 1991).

59. *See Bat'tles v. Board of Adjustment*, 711 S.W.2d 297 (Tex. App.—Dallas 1986, no writ).

60. *See Feiler v. Fort Lee Board of Adjustment*, 573 A.2d 175 (N.J. Super. Ct. App. Div. 1990); *see also Giutini v. Aronow*, 459 N.Y.S.2d 117 (N.Y. App. Div. 1983); *see also Van Duesen v. Jackson*, 312 N.Y.S.2d 853 (N.Y. App. Div. 1970).

It is factually undisputed and unchallenged that the only hardship to Petitioners in including Madero Hills in the PMD zoning ordinance was financial. Such "hardship" does not empower the ZBA to grant any variance, consequently, seeking a variance from the ZBA would have been futile.

Additionally, the law in Texas is clear that only a city council is empowered to establish the density of a tract submited to the municipality for subdivision. It is equally clear that El Paso, Texas, Ordinance §2.16.030 (variance power of ZBA) does not increase the power conferred upon the ZBA by the State of Texas to approve variances. Despite these restraints upon the power of the ZBA, the lower appellate court in the instant action would require Petitioners to apply to the ZBA for a variance. The ZBA can only grant a variance in exceptional cases and then only in such a manner as will be in harmony with the general purpose of the PMD zoning ordinance and in accordance with the general or specific rules contained within such ordinance.[61] To permit a zoning board of adjustment to grant a variance increasing density is not in harmony with the general purpose of a zoning ordinance and would be an improper delegation of legislative authority in violation of Article 2 §1 of the Texas Constitution and Article 1 §1 of the United States Constitution.[62] The granting of a variance to Petitioners for the development of Madero Hills would have been an improper delegation of legislative authority and therefor seeking such a variance a futile act.

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61. *See Board of Adjustment v. Stovall,* 218 S.W.2d 286 (Tex. Civ. App.—Fort Worth 1949, no writ).

62. *See* U.S. Const. art. 1 § 1; Tex. Const. art. 2 § 1; *see also Stovall* at 288; *Harrington v. Board of Adjustment,* 124 S.W.2d 401 (Tex. Civ. App.—Amarillo 1939, writ ref'd).

CONCLUSION

No matter how temporary a taking may be, the Constitution requires that a property owner be compensated for such taking. This Court has ruled as unconstitutional the process in Californai restricting the remedy of property owners to merely seeking to invalidate a regulation. Such process has been referred to as a regulatory game in which the property owner never won. Even if the property owner was successful in invalidating the ordinance, the zoning authority could simply change the regulation, requiring the property owner to repeat the process, ad infinitum.[63]

There is no difference between the regulatory game this Court held as unconstitutional in *First English* and that practiced by the City of El Paso in the instant action. The common factor to both is that no matter whether the regulation is invalidated or a variance obtained, the land owner has been unconstitutionally deprived of his property. The fact that a permanent taking may be transformed into a temporary one is irrelevant to the determination of whether a taking has occurred. Yet, without further guidance from this Court, the regulatory game declared unconstitutional in *First English* has endured. The names may have changed to "variance" and "lack of ripeness" but the process of denying property owners their Constitutional guaranteed rights repeates itself and will until this Court instructs otherwise. For all the reasons addressed in this petition, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

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63. *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655-56 n.22, 101 S. Ct. 1287, 67 L.Ed.2d 551 (U.S. 1981).

Respectfully submitted,

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APPENDIX A

CITY OF EL PASO, Texas, a Municipal Corporation and City Plan Commission, El Paso, Appellants,

v.

MADERO DEVELOPMENT and Construction Company, Inc., a Texas Corporation, and Chaparral Equity Corporation, a Texas Corporation, Appellees.

NO. 08-89-00322-CV.

Court of Appeals of Texas, El Paso.

January 4, 1991.

Rehearing Overruled January 30, 1991.

Landowners brought action against city and its planning commission, alleging inverse condemnation of property by rezoning. The 243rd District Court, El Paso County, Herb Marsh, J., entered judgment against city and planning commission, and they appealed. The Court of Appeals, Woodard, J., held that (1) landowner's action was not ripe, absent disclosure in record that landowner had applied for variances; (2) want of jurisdiction of subject matter of suit will arrest cause at any stage of proceedings, and it is not subject to waiver, and (3) futility doctrine did not provide exception to ripeness requirement.

Reversed and rendered; cause dismissed.

Fuller, J., filed concurring opinion.

Osborn, CJ., filed concurring and dissenting opinion.

Eduardo Mranda, Asst. City Atty., El Paso, Robert H. Freilich, Terry D. Morgan, Freilich, Leitner, Carlisle & Shortlidge, Kansas City, Mo., for appellants.

Alejandro Acosta, Jr., John S. Birkelback, Ginnings, Birkelbach, Keith & Delgado, El Paso, for appellees.

Before OSBORN, C.J., and FULLER and WOODARD, JJ.

OPINION

WOODARD, Justice.

This is an appeal from a $871,200.00, plus interest, judgment against the City and its planning commission based upon inverse condemnation of property by rezoning. The jury established the amount of damages, and the trial court determined a "taking" as a matter of law. We reverse and render.

Point of Error No. One alleges the trial court erred in failing to apply the ripeness doctrine.

In September of 1980, the landowner filed its preliminary plat with the City Plan Commission. Phase One of the plan, consisting of 1.87 acres, received preliminary approval subject to various conditions in July, 1981. Phases Two, Three and Four, consisting of thirty-two acres, were approved likewise in December 1982 and

February 1984. Phase One was the only plan that received final approval, subject to certain conditions, and this was effected on December 1982 and February 1984. this was effected on December 2, 1982. In August of 1985 the landowner was notified by letter that there had been no activity on Phase One of the subdivision since the Plan Commission had approved it, and pursuant to the City's ordinance, "[f]ailure to submit the recording plat within one year from the date of the City Plan Commission approval of the final plat shall terminate all proceedings unless an extension of a specified amount of time is approved by the City Plan Commission." The letter further stated the subdivision file was officially closed.

In January of 1986, the land was rezoned for "Planned Mountain Development (PMD)" which entailed more restrictive use.

[1] A controversy in administrative law is "ripe" for the courts when it has "legally matured" within its province. The ripeness doctrine is to prevent the courts, by avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L.E.2d 681 (1967).

[2, 3] An administrative action must be final before it is judicially reviewable, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985). The finality requirement is concerned with whether the initial decision maker has arrived at a definitive position

on the issue that inflicts an actual concrete injury. It is not the same as an exhaustion of remedy requirement that generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Id.* "Although '[t]he question of what constitutes a "taking" for the purposee of the Fifth Amendment has proved to be a problem of considerable difficulty,' . . . among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. *Id.*

[4] In this case, as in the *Williamson* case, the record does not disclose that the landowner has applied for variances to the zoning. It therefore, leaves open the possibility that it could develop the subdivision according to its plat, or if not according to its plat, with some compromise to its plat after obtaining certain variances and that this would give it reasonable beneficial use of its property. The fact that the City notified the landowner that the file was "officially closed" due to inactivity would not obviate this procedure. The "closing of a file," per se, does not indicate a definitive position on the constitutional issue that inflicts an actual, concrete injury, and any problems or prohibitions in relation to the reopening of the file have not been made a part of the issue in this case.

[5-8] Appellees contend the Appellants waived the "ripeness doctrine" as the Appellants made it their basis for a directed verdict when the Plaintiffs/Appellees rested their case, and then proceeded with their own evidence. *Jacobini v. Hall*, 719 S.W.2d 396 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.). The "Motion for Directed Verdict" clearly embodies the "ripeness doctrine" in its underlying grounds and ends with the following paragraph:

> Defendants are entitled to an instructed verdict on each of Plaintiffs' claims. The evidence clearly shows that there is no question of fact to submit to a jury, and that the question of whether Defendants' conduct amounts to a taking within the terms of Texas Constitution Article I, Section 17, is a question of law which is premature and cannot yet be submitted to the court.

The motion, in essence, notifies the court that the Plaintiffs have not established the condition precedent to empower the court to proceed with the adjudication of the subject matter. It expressly requests a directed verdict, but inferentially urges abatement or dismissal for want of jurisdiction. A principal purpose of a pleading is to inform the court and the opposing party of the facts relied on and of the pleader's claims. It is to be "considered for all that it means instead of what is is called," *Gratehouse v. Gratehouse*, 417 S.W.2d 592 (Tex. Civ. App.—Waco 1967, no writ); Tex. R. Civ. P. 71. Generally, there are three jurisdictional elements: (1) jurisdiction over the subject matter; (2) jurisdiction over the person or res; and (3) power to render the particular relief awarded. *Mobil Oil Corporation v. Matagorda County Drainage District No. 3*, 580 S.W.2d 684 (Tex.

Civ. App.—Corpus Christi 1979), *reversed on other grounds*, 597 S.W.2d 910 (Tex. 1980). Subject matter jurisdiction exists when the nature of the case falls within a general category of cases the court is empowered, under applicable statutory and constitutional provisions, to adjudicate. *Bullock v. Briggs*, 623 S.W.2d 508 (Tex. App.—Austin 1981, writ ref'd n.r.e.), *cert. denied*, 457 U.S. 1135, 102 S. Ct. 2962, 73 L.Ed.2d 1352 1982). Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question and to determine whether or not they are sufficient to invoke the exercise of that power. *Brown v. French*, 413 S.W. 2d 924 (Tex. Civ. App.—Amarillo), *reversed on other grounds*, 424 S.W.2d 893 (Tex. 1967). Want of jurisdiction of the subject matter of a suit will arrest a cause at any stage of the proceedings. *Southwestern Bell Telephone Company v. City of Kountze*, 548 S.W.2d 871 (Tex. Civ. App.—Beaumont 1976, no writ). It is not subject to waiver. *Armstrong v. West Texas Rig Company*, 339 S.W.2d 69 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.).

[9-13] The "ripeness doctrine" involves the issue of jurisdiction of the subject matter and power to render a particular relief. In *Williamson*, 473 U.S. at 200, 105 S. Ct. at 3123, 87 L.Ed.2d at 147, the Court stated "[i]n sum, respondent's claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." [Emphasis added]. In *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 840, 348, 106 S. Ct. 2561, 2566, 91 L.Ed.2d 285, 294 (1986), the Court

stated "[i]t follows from the nature of a regulatory takings claim that *an essential prerequisite to its assertion* is a final and authoritative determination of the type and intensity of development, legally permitted on the subject property." [emphasis added]. By a "claim being premature," there is no claim that the court has jurisdiction or power to adjudicate. By a claim having "an essential pre requisite to its assertion," there is no claim that the court has jurisdiction or power to adjudicate until the essential prerequisite has been complied with. The "final determination" is a condition precedent to conferring jurisdiction to the trial court. There can be no "taking" by eminent domain until this condition is complied with. The burden of establishing jurisdiction, of proving a justiciable controversy, clearly falls on the moving party. *Reuter v. Cordes-Hendreks Coiffures, Inc.*, 422 S.W.2d 198 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ).

[14] Appellees attempt to invoke the "futility doctrine" as espoused in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285 (1986), as an exception to the "ripeness" requiremet. They claim that by the Appellants determining the slope of the area to be of forty-eight percent grade, the number of residential plots would be reduced from 150 to 11 plots under the PMD zoning, and according to their witnesses render the property valueless. They contend the Zoning Board of Adjustment had no authtority to make variances not in keeping with the specific intent and extent of the PMD ordinance [*Board of Adjustment of the City of San Antonio v. Willie*, 511 S.W.2d 591 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.)], and any request for them to do so would

be futile. This, therefore, would obviate the necessity of seeking a "final" determination. *El Paso, Tex., Ordinances* ch. 2.16 § 2.16.030 (1989) provides that the Board is empowered to authorize variances as will not be contrary to the public interest; and where a literal enforcement of the zoning laws, due to the nature of the property, would result in unnecessary hardship to an extent preventing any reasonable use of the property whatsoever, and so that the spirit of the zoning laws shall be observed and substantial justice done.

[15] It follows from the naturue of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. This is a question of degree—and therefore cannot be disposed of by general propositions. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285 (1986).

There is then, a question of degree in determining whether a particular variance would violate the spirit of the zoning laws. Some number of density of lots over eleven may or may not, and that must be determined by the Zoning Board of Adjustment acting within its guidelines. After this degree is attained the degree of taking can be arrived at. These degrees not only affect whether there is a taking but are relevant to the market value of the property for the purposes of establishing damages, if there is a taking.

[16] Appellees further attempt to invoke the futility doctrine by testimony that two of the city aldermen

stated words to the effect that they wished to impede the development of the property by zoning the property PMD. Therefore, it would be futile to attempt to obtain variances in view of the city's mind-set. Individual legislators are incompetent witnesses in regard to laws enacted because any law expresses the collective will of the legislative body and must be interpreted in that light. *Mayhew v. Town of Sunnyvale,* 774 S.W.2d 284 (Tex. App.—Dallas 1989, writ denied).

Point of Error Number One is sustained. Judgment of the trial court is reversed and the cause is dismissed for want of jurisdiction.

FULLER, Justice, concurring.

On February 1, 1989, the Appellants filed their Original Answer in which the City clearly stated that Appellees had not exhausted their administrative remedies because they had failed to pursue the acquisition of a variance or special exception from the Zoning Board of Adjustment for the City of El Paso. Further, such failure to exhaust their administrative remedies precluded Madero from seeking relief for a "taking" of property in the district court under Article I, § 17 of the Texas Constitution.

At the hearing on its Motion for Summary Judgment, the City clearly stated to the trial judge:

> MR. CAYLOR: May it please the Court, the legal issue which is being brought to the Court this morning can be expressed in one word, "*ripeness.*" The City's position with respect to that legal issue can be expressed in one sentence, and that is, that *this case is not ripe to be presented to this Court* because the City has never taken any final action under the ordinance which is being challenged by the Plaintiffs today.

On the Motion for Directed Verdict filed at close of Madero's case-in-chief, Appellants again clearly pointed out the contention of want or lack of jurisdiction of the trial court to proceed based on lack of ripeness of the controversy.

I agree that the trial court erred in proceeding to trial and entering judgment because the matter of "taking" simply was not "ripe" for judicial determination.

OSBORN, Chief Justice, concurring and dissenting.

I concur in part and respectfully dissent in part.

There can be no question that the ripeness doctrine, when properly raised, will prohibit the trial of issues such as are raised in this case. I concur with the majority opinion that there can be no trial on the merits where an administrative decision is not final and the case in effect is not ripe for trial of the issues in dispute.

My dissent concerns when and how that issue must be raised. In this case, there was nothing pending before any administrative board or commission at the time this case was tried. There was a procedure whereby a request could be made for a variance or change in administrative zoning orders. Any change in prior zoning provisions would necessarily change the use which could be made of the land in question. At the time of trial, the Appellees did not have pending any request for a variance. The Appellants in their answer alleged that the Appellees had not exhausted its administrative remedies. It did not file a plea in abatement which if granted would have avoided a trial at a time when it was contended the case was not ripe for trial on the merits.

The issue was raised again in a Motion for Summary Judgment. This is not an appeal from the granting of such

a motion, and the issues raised in a summary judgment hearing may not be raised again after a trial on the merits based upon the summary judgment order. *Ackermann v. Vordenbaum,* 403 S.W.2d 362 (Tex. 1966); *Note, Appeal and Error: Reviewability of Order Denying Motion for Summary Judgment After Trial on Merits,* 16 Okla. L.Rev. 335 (1963).

The ripeness doctrine was again raised in a Motion for Directed Verdict filed at the close of the Plaintiffs' case. The motion was overruled and another motion was not presented at the close of all the evidence. This resulted in the issues raised by the motion being waived for appellate review unless raised in some other manner. On this issue, the cases are legion. *Jacobini v. Hall,* 719 S.W.2d 396 (Tex. App.—Fort Worth, 1986, writ ref'd n.r.e.); *Shindler v. Marr & Associates,* 695 S.W.2d 699 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Montgomery Ward & Company v. Garza,* 660 S.W. 619 (Tex. App.—Corpus Christi 1983, no writ); *Texas Steel Corporation v. Martinez* ,518 S.W.2d 264 (Tex. Civ. —Fort Worth 1976, writ ref'd n.r.e.); *Horizon Properties Company v. Douglas,* 588 S.W.2d 111 (Tex. Civ. App. App.—El Paso 1974, writ ref'd n.r.e.); 3 R. McDonald, Texas Civil Practice § 11.28 (1983).

If the ripeness doctrine is a jurisdictional issue, then this Court should not rely upon a Motion for Instructed Verdict or Motion for Summary Judgment as the basis for the issue having been raised. We should, sua sponte, determine that this court is without jurisdiction and dismiss the case. *Southwestern Bell Telephone Company v. City of Kountze,* 543 S.W.2d 871 (Tex Civ. App.—Beaumont 1976, no writ). That apparently is what the court has done without saying so.

I conclude, admittedly without a great deal of suppporting authority, that the ripeness doctrine is not jurisdictional and is an issue that must be properly raised in the trial court or it is waived. In *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285 (1986), the issue was raised in the trial court by a demurrer to the complaint. We have abolished the demurrer in Texas. I concluded that the issue should have been raised by a plea in abatement, and absent some procedure which properly raised the issue in the trial court, the ripeness doctrine was waived and should not be the basis for a reversal, sua sponte, after the basis for a reversal, sua sponte, after the case has been tried on the merits. Therefore, I dissent.

APPENDIX B

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711

John T. Adams, Clerk

September 5, 1991

Mr. John S. Birkelbach
Ginnings, Birkelbach,
Keith & Delgado
P. O. Box 54
El Paso, TX 79940

Mr. R. Wayne Pritchard
Ginnings, Birkelbach,
Keith & Delgado
P. O. Box 54
El Paso, TX 79940

Mr. Alejandro Acosta, Jr.
Ginnings, Birkelbach,
Keith & Delgado
P. O. Box 54
El Paso, TX 79940

Mr. Eduardo Miranda
Assistant City Attorney
#2 Civic Center Plaza
El Paso, TX 79901-1196

Mr. Terry D. Morgan
Freilich, Leitner, Carlisle
& Shortlidge
4600 Madison, Suite 1000
Kansas City, MO 64112

Mr. Robert H. Freilich
Freilich, Leitner, Carlisle,
& Shortlidge
4600 Madison, Suite 1000
Kansas City MO 64111

Mr. David C. Caylor
City Attorney
2 Civic Center Plaza,
9th Floor
El Paso, TX 79901

RE: Case No. D-0849

Style: MADERO DEVELOPMENT and CONSTRUCTION COMPANY, INC., a TEXAS CORPORATION, and CHAPARRAL EQUITY CORPORATION, a TEXAS CORPORATION v. CITY OF

EL PASO, TEXAS, a MUNICIPAL CORPORATION, and CITY PLAN COMMISSION, EL PASO

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS, Clerk
By: /s/ COURTLAND CROCKER
Courtland Crocker, Deputy

APPENDIX C

NO. 89-443

IN THE DISTRICT COURT
OF EL PASO COUNTY, TEXAS
243RD JUDICIAL DISTRICT

MADERO DEVELOPMENT AND
CONSTRUCTION COMPANY, INC.,
a Texas Corporation, and
CHAPARRAL EQUITY CORPORATION,
a Texas Corporation,
Plaintiffs,

v.

CITY OF EL PASO, TEXAS, a
Municipal Corporation, and
CITY PLAN COMMISSION, EL PASO,
Defendants.

CORRECTED JUDGMENT

(Filed August 31, 1989)

On the 19th day of June, 1989, came on to be heard the above-entitled and numbered cause in which MADERO DEVELOPMENT AND CONSTRUCTION COMPANY, INC. and CHAPARRAL EQUITY CORPORATION are the Plaintiffs, and the CITY OF EL PASO, TEXAS and CITY PLAN COMMISSION, EL PASO, are the Defendants. The parties appeared in person and by attorney of record and announced ready for trial. Having been previously demanded, a jury consisting of twelve (12) good and lawful jurors was duly empaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury by special questions. The Charge of the Court, including the special questions, and the verdict of the jury are incorporated herein for all purposes. The jury found as follows:

QUESTION NO. 1

Do you find from a preponderance of the evidence that in applying the PMD zoning ordinance to Plaintiff's Madero Hills property, the City has "taken" Plaintiff's Madero Hills property?

Answer: "We do" or "we do not"
ANSWER: We do.

QUESTION NO. 2

What do you find to be the difference in the market value, if any, of Plaintiffs Madero Hills property immediately prior to the inclusion of Madero Hills into the PMD zoning ordinance and immediately after the inclusion of Madero Hills into the PMD zoning ordinance?

Answer in dollars and cents, if any.
ANSWER: $871,200.

The Court, after hearing all the evidence and arguments, finds as an independent conclusion and as a matter of law, that the City's application of the PMD zoning ordinance to Madero Hill's property resulted in a taking of the property for which Plaintiffs must be compensated.

In regard to the word "Plaintiff's" as it was typed in Question One, and word "Plaintiffs" as typed in Question Two, the Court finds, after considering the charge, the pleadings, the evidence and the record, that

the intention of the verdict is to be ascertained and construed as a verdict taken by both Plaintiffs against both Defendants.

Judgment therefore is rendered upon the verdict in favor of the Plaintiffs and against the Defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Plaintiffs have and recover judgment from and against Defendants, jointly and severally, in the amount of Eight Hundred Seventy One Thousand Two Hundred Dollars ($871,200.00), plus pre-judgment interest from December 2, 1986 to August 30, 1989 of Two Hundred Thirty Eight Thousand Nine Hundred Twenty-three Dollars ($238,923.00), for a total of One Million One Hundred Ten Thousand One Hundred Two Dollars ($1,110,123.00).

IT IS FURTHER ORDERED that the judgment hereby rendered shall bear interest at the rate of ten percent (10%), compounded annually, from August 31, 1989 until paid.

All costs of Court expended or incurred in this cause are hereby adjudged against CITY OF EL PASO and CITY PLAN COMMISSION, jointly and severally, Defendants. All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary. All other relief not expressly granted herein is denied.

SIGNED this 31st day of August, 1989.

By: /s/ (Signature Illigible)
JUDGE

APPROVED AS FORM ONLY:
Eduardo Miranda
Attorney for Defendants

/s/ ALEJANDRO ACOSTA, JR.
Attorney for Plaintiffs

Date Entered of Record 8-31-89
Certified True and Correct
EDIE RUBALCABA,
District Clerk,
El Paso, Texas

By: _____

APPENDIX D

008226

AN ORDINANCE AMENDING CHAPTER 25 (ZONING) OF THE EL PASO CITY CODE, THE PENALTY BEING AS PROVIDED IN SECTION 25-96 OF THE CODE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO, TEXAS:

1. That Section 25-24 RMD Residential Mountain District of the El Paso City Code (Zoning) shall be and is hereby amended to read as follow:

"Sec. 25-24. PMD Planned Mountain Development District

25-24.1 *Purpose of the district.* The purpose of this district is to promote the following city objectives:

(1) To protect significant natural features of the mountain development area and preserve the City's unique visual setting as part of the comprehensive plan.

(2) To provide an alternative approach to conventional flatland development by allowing transfer of residential densities through clustering of dwellings in order to preserve larger areas of open space.

(3) To minimize scarring and disturbances of the natural character of the mountain development area through control of grading and cut/fill operations as defined in the Grading Ordinance.

(4) To control water runoff and soil erosion.

(5) To provide a safe means of ingress and egress for vehicular and pedestrian traffic to and within the mountain development area.

(6) To encourage sound engineering practices related to mountain developpment.

25-24.2 *Minimum district area.* The minimum area for a planned mountain development district where common or public open space is to be provided shall be three (3) acres. Extensions to the original district, from a common boundary, may be considered in increments of less than three (3) acres provided that all other requirements are observed. Where buildable areas and private open space are provided on each lot the three (3) acre minimum requirement does not apply and the provisions of section 25-24.9 shall be met.

25-24.3 *Ownership control.* Where required, the common open space shall be owned by an incorporated or unincorporated association to assure that it will be permanently maintained in its natural state. Open space may be made public if dedicated or transferred in trust to the City and the city council accepts such dedication or transfer without affecting any other provision of this ordinance.

25-24.4 *Permitted uses.*

(1) Detached single-family dwelling.

(2) Two-family dwelling, attached single-family dwelling (including condominiums) and multi-family dwellings.

(3) Publicly owned park, parkway, playground, hiking trail, recreation facility.

(4) Public and private school accredited by the State of Texas to give elementary and high school training.

(5) Church.

(6) Facilities and structures necessary for rendering public utility service.

(7) Neighborhood recreational facilities, open or enclosed, such as swimming pools, tennis courts, other playing surfaces, picnic areas, or other recreational areas, including necessary accessory facilities such as bath houses, sun or rain shelters, storage buildings, and parking areas, for the exclusive use of members of and to be operated and managed by a non-profit neighborhood organization, neighborhood association or similar type of neighborhood group.

25-24.5 *Permitted accessory uses.* Permitted uses in accordance with Section 25-24.4 may also have the following accessory uses.

(1) Building for domestic storage.

(2) Garage, private.

(3) Garden house, toolhouse, playhouse or greenhouse incidental to residential uses.

(4) Home occupation as defined in this Code.

(5) Swimming pool and game court, for use of occupants.

(6) Signs as regulated in Section 25-24.6.

(7) Keeping of animals for personal use or enjoyment and not as a business, when in compliance with Chapter 5 of the El Paso City Code.

(8) Temporary buildings, or structors, including relocatable office or storage units, the uses of which are incidental to construction operations during development being conducted on the same lot or subdivision and which shall be removed upon completion or abandonment of such construction, or upon the expiration of a period of two (2) years, whichever is sooner.

(9) Temporary buildings or structures, including a relocatable office unit for use as a sales or

rental office for an approved real estate development or subdivision, located on the same lot as said real estate development or subdivision and which shall be removed upon completion or abandonment date of the two (2) years, whichever is sooner.

(10) Yard sale or garage sale for disposal of used household items, provided such sales are not held more frequently than once a year on the same lot, are not conducted for more than two (2) days, and include items assembled only from households in the immediate neighborhood.

(11) Off-street parking and loading spaces.

(12) Residential type television or radio receiving antennas, roof-mounted, and not exceeding five (5) feet in height above the highest point in the roof.

(13) Federally licensed amateur and CB radio stations complying with FCC regulations. Installation of radio towers and mast shall require approval of the building official to certify compliance with the building code of the City of El Paso.

(14) Satellite receiving dishes and other satellite receiving antennas conforming with Section 25-64.3 (10).

(15) Accessory uses as follows in attached single family developments or multi-family developments where permitted by special permit:

(a) An office located in a main building for administration of a development containten (10) or more dwelling units.
(b) A laundry room for use of occupants of a development.

(c) A sauna or exercise room or similar facility for use of occupants of a development.

(d) Coin-operated vending machines for candy, tobacco, ice, soft drinks and sundries, inside a building.

(16) Maintenance facilities for permitted uses.

25-24.6 *Signs.* Signs may be placed on a building or land subject to the general sign regulations of Section 25-62.

25-24.7 *Uses permitted by special permit.* The following uses may be permitted by special permit, if approved by the city council, with or without conditions, following a recommendation by the city plan commission, in accordance with the procedure, guides, and standards of section 25-83. These uses may be permitted concurrently with the establishment of a PMD District subject to all of the procedural requirements of a special permit.

(1) Resort lodge.

(2) Art galleries, museums, libraries and other similar philantropic institutions.

(3) Dude ranch.

(4) Golf course on a site with a slope less than 15%.

(5) Tennis clubs, with game courts and swimming pools for use of occupants or their guests in accordance with the conditions stated in Section 25-63.

(6) Private clubs requiring a liquor district in conjunction with a golf course or tennis club.

(7) Convalescent, nursing or rest homes.

(8) Personal care homes providing that the facility cares for no more than 7 recipients and that it is in accordance with Section 25-63.14.

(9) Retail shopping facilities occupying an area of two (2) acres or less.

(10) Church on a site less than (3) acres.

(11) Theatre—indoor or open air.

(12) Picnic areas.

(13) Major facilities for generation of energy, water treatment plants, commercial and public radio television broadcasting and microwave receiving facilities, storage yards for public utilities and similar uses.

(14) Public or governmental buildings and uses.

(15) Wind-driven electric generation or wind driven pumps complying with the provisions of Section 25-63.12.

25-24.8 *Common or public open space and related lot size standards.* Where common or public open space is provided in the Planned Mountain Development District, the common or public open space shall be shown on the required site plan and subdivision plat. To retain the significant natural features of the montain development area, the common or public open space increases and densities decrease as the slope of the terrain increases. When a proposed development containing common or public open space is to be accomplished in phases, the initial phase which is platted shall contain a minimum of three (3) acres and each phase shall individually maintain the common or public open space required. The following standards for single-family detached dwellings, two-family dwellings, single-family attached dwellings and multi-family dwellings shall be observed:

(1) Common or public open space required and density limitations.

(a) Where the required minimum common or public open space is provided given the slope of the terrain, the maximum dwelling units permitted per gross acre shall be as follows:

Percent Slope	Maximum Density Per Gross Acre	Minimum Common or Public Open Space or Percent of Site to Remain in Natural State
0 - 5	20	5.50
4 - 10	25	5.00
10 - 15	30	4.50
15 - 20	40	3.75
20 - 25	45	3.00
25 - 30	50	2.25
30 - 35	55	1.25
35 - 40	60	.75
over 40	65	.25

(2) Minimum lot areas.

	Minimum Lot Area in Square Feet
(a) Single-family detached dwelling	5,000
(b) Single-family attached dwelling	3,000
(c) Two-family dwelling	6,000
(d) Multi-family dwelling	none
(e) Church	3 acres

25-24.9 *Buildable area and related lot size standards.* Buildable areas for single-family detached dwellings,

where private open space is provided in lieu of common or public open space, shall comply with the standards contained in the following table. To retain the significant natural features of the mountain de-development area, densities decrease as slope of the terrain increases.

Percent Lot Slope	Minimum Lot Area (sq. ft.)	Minimum Width (feet)	Minimum Depth (feet)	Maximum Buildable Area in Percent of Lot Area
0 - 5	6,000	60	90	80
5 - 10	8,000	70	100	75
10 - 15	10,000	75	110	70
15 - 20	12,000	80	110	60
20 - 25	16,000	100	120	55
25 - 30	20,000	125	150	50
30 - 35	24,000	130	170	45
35 - 40	1 acre	175	190	40
over 40	2 acres	230	270	30

25-24.10 *Private and common or public open space.* Where a minimum of twenty (20) percent of the gross area of a site is designated as common or public open space in addition to complying with section 25-24.9, the minimum lot standards pertaining to the lower percent slope shown for the line immediately above the one indicating the slope of the site shall apply.

25-24.11 *Yard and set back standards.*

(1) A minimum distance of ten (10) feet between detached structures, plus two (2) additional feet of separation for each additional story over two (2).

(2) A minimum ten-foot setback for all structures abutting platted public or private right-of- way,

except that garages or carports perpendicular to any right-of-way shall have a minimum twenty-foot setback.

(3) Buildable areas, where required, shall be shown on the site plan and subdivision plat and deeds and covenants must reflect that structures, walls, or service areas will be within the buildable areas.

(4) Where a site plan is not required for detached single-family dwellings pursuant to Section 25-24.13 (2), the following minimum yard requirements shall be observed:

(a) 10′ front yard
(b) 10′ rear yard
(c) 5′ side yard
(d) 10′ side yard abutting a side street

25-24.12 *Height standards.* The height of each building or structure shall not exceed two and one half (2½) stories or thtirty-five (35) feet, measured from the lowest living area floor level and shall not exceed thirty-five (35) feet from the highest elevation of the lot, except that the city plan commission may recommend and the city council may approve height limits in excess of those mentioned above where it can be demonstrated that the additional height will not have a detrimental effect on surrounding land uses.

25-14.13 *Property development standards.* The following property development standards shall apply to all land, buildings and structures within the PMD.

(1) Subdivision plat. Buildings and structures in the PMD shall be erected only on land where a plat or replat has been approved by the city plan commission, filed of record in accordance with Ordinance No. 7714, and indicates compliance with the provisions of this section. Each

attached or detached single-family dwelling must be platted on an individual lot prior to issuance of occupancy permits.

(2) Site plan. Where the minimum yard standards of section 25-24.11 (4) are observed, detached single-family dwellings shall not require a site plan. Under all other conditions, a site plan complying with all of the requirements of section 25-82 is required for all property within the PMD. No building permit shall be issued until the site plan is approved by city council. If the development is to be undertaken in a series of phases, a development schedule indicating phasing shall be submitted concurrently with the site plan required by section 25-82.

(3) Common or public open space. Where required, the total amount and distribution of common or public open space shall be shown on the site plan and subdivision plat and shall be expressed as the percent of the site which will remain in its natural state. Satisfactory provisions for assuring continued retention of the common or public open space shall be provided in accordance with the procedures set forth in section 25-67.

(4) Percent slope. The percent slope of the proposed planned mountain development used to determine the common open space shall be shown on the required site plan and subdivision plat.

(5) Perimeter treatment. The perimeter treatment of the proposed planned mountain development shall be designed to insure compatibility with adjacent existing or potential development by provision of compatible land uses and structures. A minimum setback of ten (10) of separation for each story or fraction thereof

shall be maintained between any structure and the outside boundary of the proposed planned mountain development.

(6) Private streets. Where authtorized by the city plan commission in approving a subdivision plat, streets may be privately owned.

(7) Preservation of the environment. In all planned mountain developments, existing vegetation, animal life, arroyos, flood prone areas, steep slopes, and other natural features shall be considered in the planning, design and layout of

(8) Right-of-way and pavement widths. The right-of-way and pavement widths for internal ways, streets and alleys within and adjacent to the proposed planned mountain development shall be:

(a) determined from the standards contained in Subdivision Ordinance No. 7714 and any applicable ordinance governing private streets.

(b) in conformity with the estimated needs of the entire planned mountain development and the traffic to be generated thereby.

(c) adequate and sufficient in size, location and design to accommodate the maximum traffic, parking, loading needs and the access for fire-fighting equipment vehicles while preventing undue scarring and grading.

(9) Off-street parking and loading. The minimum requirements for off-street parking and loading set forth in sections.

(10) Utilitites and public services. Every planned mountain development shall be adequately

served by essential utilities and public services such as water, sanitary sewer, storm drainage, police, fire and other similar services.

25-24.14 *Property grading standards.* Grading in the PMD must be in accordance with Chapter 11A (Grading Ordinance) of the El Paso City Code.

25-24.15 *Work standards for construction.*

(1) Utility service facilities shall be placed underground and wherever practical shall lie within street right-of-way.

(2) Disturbed soil surfaces shall be stabilized by compaction and revegetation where practical to minimize blowing dust, landslides, falling rocks, debris and excessive water runoff.

(3) Any person performing grading or excavation operations shall take precautions to minimize erosion, protect any water-ways or arroyos and other natural features and to protect the health, safety and welfare of persons and public and private property from damage.

(4) All developers or property owners shall be responsible for storage and hauling of loose dirt, debris, etc., resulting from the proposed planned mountain development to an approved location for disposal.

(5) The drainage plan, prepared by a professional engineer registered in the State of Texas, which takes into consideration the health, safety and general welfare of all persons and property within and adjacent to the proposed planned moutain development, adjacent arroyos, channels, and any other collection systems which lie between the proposed development and approved drainage collection basins, shall be carried out as required by the Subdivision Ordinance.

(6) Sand and gravel extraction, borrow pits, quarrying, rock crushing and any other processing of earthen material is expressly prohibited, except that such activities may be permitted when conducted as an incidental use in preparing a site for uses otherwise permitted by Sections 25-24.4 and 25-24.7 and when conducted in accordance with an approved site plan.

25-24.16 *Environmental assessment*

(1) To ascertain how the proposed development will affect the site and adjacent areas, an environmental assessment may be required by the city plan commission and approved by the city council in conjunction with the subdivision plat required by section 25-24.13. The assessment shall be prepared in accordance with the environmental guide published by the department of planning, research and development of the City of El Paso, Texas on March 24, 1983 and as may subsequently be revised.

(2) If the city council finds after a recommendation of the city plan commission and the El Paso Mountain Committee, that there is evidence of an adverse effect upon the environment as expressed in the environmental assessment or as determined at the public hearing, the city council may approve specific modifications to the site plan which lessen or eliminate the adverse effects."

2. That Section 25-6 of the El Paso City Code (Zoning) shall be and is hereby amended by adding the following:

"*Acreage, Gross:* The total area of a proposed development, within a planned mountain development district, shown on the original subdivision plat or site plan submitted.

Open space, private: The part of a lot owned by a person or entity in a planned mountain development specifically designated as open area to remain undisturbed in its natural state.

Open space, public: The land dedicated to and accepted by the City of El Paso in a planned mountain development specifically designated as open area to remain undisturbed in its natural state.

Slope, percent of: The percent average slope shall be determined by using the following equation:

$$S = \frac{.0023\ IL}{A}$$

S = average slope, percent
I = contour interval in feet
L = contour length in feet
A = parcel area in acres"

3. That Section 25-6 of the El Paso City Code (Zoning) shall be and is hereby amended by changing the following definitions to read as follows:

"*Dwelling, multi-family:* A building, or portion thereof, designed or used for occupancy by two (2) or more families, all living independently of each other in separate dwelling units.

Dwelling, attached single-family: A row or group of two (2) or more adjoining dwelling units each of which is separated from the others by a common property line.

Open space, common use: Land owned by an incorporated or unincorporated association in a planned residential or planned mountain development, specifically developed for common recreational areas, designated as open area for the use and enjoyment of all the owners of the development or in the planned mountain development district as land to remain undisturbed in its natural state, except for golf courses where allowed under Section

25-24.7; does not include streets, drives and alleys, private yards and patios of individual building sites or other areas designed primarily to serve other functions, such as parking or storage areas except for hiking trails and walking paths where approved by the city council."

Passed and approved this 4th day of December, 1984.

ATTEST:

(Signature Illigible)
City Clerk

APPROVED AS TO FORM:

(Signature Illigible)
City Attorney

APPROVED AS TO CONTENT:

(Signature Illigible)
Department of Planning, Research
and Development

(Signature Illigible)
Mayor

APPENDIX E

TEXAS LOCAL GOVERNMENT CODE

§ 211.009. Authority of Board

(a) The board of adjustment may:

(1) hear and decide an appeal that alleges error in an order, requirement, decision or determination made by an administrative offical in the enforcement of this subchapter or an ordinance adopted under this subchapter;

(2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so; and

(3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done.

(b) In exercising its authority under Subsection (a)(1), the board may reverse or affirm in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decisions, or determination, and for that purpose the board has the same authtority as the administrative official.

(c) The concurring vote of four members of the board is necessary to:

(1) reverse an order, requirement, decision, or determination of an administrative official;

(2) decide in favor of an applicant on a matter on which the board is required to pass under a zoning ordinance; or

(3) authorize a variation from the terms of a zoning ordinance.

(2)

91-901

No. 91-101

In The

Supreme Court of the United States

October Term, 1991

MADERO DEVELOPMENT AND CONSTRUCTION COMPANY, INC., a Texas Corporation, and CHAPARRAL EQUITY CORPORATION, a Texas Corporation,

Petitioners,

v.

CITY OF EL PASO, TEXAS, a Municipal Corporation, and CITY PLAN COMMISSION,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals Of Texas, Eighth District, El Paso, Texas

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT H. FREILICH
RICHARD G. CARLISLE
TERRY D. MORGAN
FREILICH, LEITNER, CARLISLE & SHORTLIDGE
1000 Plaza West
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(816) 561-4414

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *Madero Development and Constr. Co. v. City of El Paso*, No. EP-86-CA-403, *slip op.* (W.D. Tex. Dec. 21, 1988), the United States District Court for the Western District of Texas granted the City of El Paso's motion for summary judgment dismissing Petitioners' claims as unripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (requiring, first, a final decision from the city applying its ordinance to petitioners' land and, second, a denial of just compensation to petitioners by the state court). Petitioners ignored the holdings of the District Court and refused to seek a "variance from the Zoning Board of Adjustment, the City Plan Commission, or the City Council." Slip op. at p.7.

Petitioners failed to appeal the District Court's ruling that they should seek a variance determination under Texas law and, instead, filed the instant damages action in state court. The Texas appellate court held that a variance was available to Petitioners under Texas law and that, accordingly, under state law the court was without jurisdiction until Petitioners sought a final decision from the City of El Paso.

The Texas court's decision that Madero was required to seek a final decision from the City of El Paso raises no novel issues of federal law; nor does the decision of the Texas courts in any way conflict with any other state or federal decision. There is not even a hint that the State of Texas – nor, for that matter, the City of El Paso – has acted so as to raise an important question of federal law.

LIST OF PARTIES

Respondent City of El Paso, Texas, is a municipal corporation organized under the laws of the State of Texas. Respondent City Plan Commission is a public body formed under the laws of the State of Texas and the El Paso City Code.

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TABLE OF AUTHORITIES

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CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

Petitioners' Petition omits the relevant opinion of the United States District Court for the Western District of Texas in the case styled *Madero Development and Construction Co. v. City of El Paso*, No. EP-86-CA-403 (Dec. 21, 1988). That opinion, which is unreported, is included in Respondents' Appendix, at p.1-a. The other relevant opinion, *City of El Paso v. Madero Development*, 803 S.W.2d 396 (Tex. Ct. App. 1991), is contained in Appendix A of the Petition for Writ of Certiorari.

JURISDICTION

Petitioners have failed to allege a constitutional violation invoking the jurisdiction of this Court since the mere enactment of the City's zoning ordinance does not violate the Just Compensation Clause of the Fifth Amendment or any other section of the United States Constitution. Further, the Constitution of the State of Texas provides a compensation remedy, which Petitioners have not yet pursued.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Article I, § 17 of the Texas Constitution provides in pertinent part as follows:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money . . .

Pertinent provisions of the City of El Paso Ordinances and Texas Local Government Code are attached as Appendices "D" and "E" respectively, of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Respondents' Statement of Facts

Petitioner's Statement of the Case fails to specify the stage in the proceedings, both in the District Court and in subsequent proceedings, at which the Questions Presented for Review were raised or to otherwise comply with the provisions of Supreme Court Rule 14.1(h). Further, Petitioners' Statement of the Case is argumentative,

fails to cite the record below, and presents a misleading and inaccurate account of the facts regarding their litigation against the City of El Paso in the federal and state courts.

Respondents do not accept Petitioners' statement of the facts of this case and would substitute the following statement:

Petitioners in this case, Madero Development and Construction Co. and Chaparral Equity Corp., allege that the rezoning of their property by the City of El Paso to Planned Mountain Development (PMD) constituted a compensable taking.

Richard Miller purchased 100 acres on Crazy Cat Mountain in the City of El Paso in the late 1960s, (SF 929).[1] Miller obtained rezoning for 67 acres of the property from R-3 to Planned Unit Development (Def.Exh. 1; SF 957-958, 930), and received approval for two single-family residential units per acre in a development known as "Sierra Crest," (Def.Exh. 2; SF 965). The remaining 33.9 acres retained the R-3 zoning classification, (SF 283-285, 508). Subsequently, Miller built several single family residences in Sierra Crest and sold all remaining lots, (SF 971-972).

At the public hearing for Miller's rezoning, the Kern Place Association voiced opposition to the project based on environmental and safety considerations, (SF 963-964). Rolando Madero, who was employed as Miller's urban

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[1] For the purposes of this brief and in compliance with Tex. R. App. P. 74(f) (1989), the trial court records will be designated: SF – Statement of Facts; Def.Exh. – Defendant's Exhibit; Pl.Exh. – Plaintiff's Exhibit; Tr. – Transcript.

designer at the time, was aware of the neighbors' opposition to development of the property, (SF 490-491, 967). Madero purchased the remaining 33.9 acres from Miller for $200,000 in 1979, (Def.Exh. 82; SF 295). This parcel ultimately became known as Madero Hills and is the subject of this law suit.

In February of 1982, Madero sold 1.417 acres of the parcel to Jorge Angulo for development purposes, (Def.Exh. 88; SF 293). In 1984, Madero sold approximately one quarter of an acre of the property he owned in fee simple, (Def.Exh. 141; SF 293, 1262, 810). After these sales, Madero Hills currently consists of approximately 32 acres, (Def.Exh. 66; SF 1261-1265). Of that 32 acres, Miller owns 20 acres due to partial foreclosure after Madero defaulted on the purchase money mortgage loan, (Def.Exh. 86; SF 936, 937, 946).

Madero sought to subdivide the property under the R-3 zoning, resulting in preliminary approval by the City Planning Commission (CPC) of the first phase of Madero Hills in July, 1981, consisting of two single family and four duplex units on 1.87 acres of land, (Pl.Exh. 30; SF 340, 671). (Miller took no part in efforts to develop Madero Hills, (SF 671, 942, 967)). Preliminary approval of Unit One was conditioned in part on submission and approval of a drainage study, (Pl.Exh. 30).

Following a request by the CPC, Madero submitted an application for preliminary approval of a Master Plan for all of Madero Hills in November, 1981, (Pl.Exh. 32, 126; SF 344). The Master Plan proposed development of 77 lots in four phases over 33.9 acres, (Pl.Exh. 32;

Def.Exh. 126; SF 614-618, 674-675). The CPC approved the development concept in the Master Plan and granted preliminary approval to phases two through four of the plat in July, 1982, (Pl.Exh. 39, 42; SF 346, 677-679). All approvals were subject to conditions, which were standard. *Id.*

In December, 1982, the CPC gave final conditional approval to Unit One of Madero Hills, subject to subsequent approval of a geological study for the site, a street drainage plan and a grading plan, (Def.Exh. 29; SF 346-347, 682-683). Thereafter, Madero sought approval for a revised final plat, with reconfigured "panhandle" lots, (Def.Exh. 30, 152; SF 701-703, 707, 712). The CPC eventually approved a revised plat (December, 1983), subject to similar conditions as imposed on the original plat, (Def.Exh. 34, 37, 38; Pl.Exh. 55; SF 713, 714, 1391-1392).

The City Council conditionally approved Madero's Mountain Development Area (MDA) grading permit application for Unit One, following appeal from CPC approval by the Kern Place Association, in July, 1984, (Pl.Exh. 65, 77). Madero did not meet the conditions attached to the grading permit, (Pl.Exh. 84; SF 809, 1035-1036, 1316-1318). All engineering work on the project by Madero ceased following the City's conditional approval of the grading permit, (SF 808, 1316-1317).

Madero did not take further steps required by City ordinance to obtain final plat approval for Units Two, Three and Four of Madero Hills. Madero did not meet the conditions attached to the final plat for Unit One and did not record the plat with the El Paso County Clerk, as required by City subdivision regulations and state law, (SF 1391-1392, 1423-1424, 1475). On August 13, 1985, the

City notified Madero that his subdivision file for Unit One was closed officially due to inactivity for more than one year and that, pursuant to the subdivision ordinance, approval had lapsed, (Pl.Exh. 83; Def.Exh. 106, VI D.1; SF 1403-1404). Thus Petitioners by their own inaction did not even complete processing of the development application under the former ordinance no less the new ordinance under attack.

The City Council passed the PMD Ordinance on December 4, 1984,[2] (Pl.Exh. 1, Ord. No. 8226.3). The purposes of the PMD district are:

(1) to protect significant natural features of the Mountain Development Area and preserve the City's unique visual setting as part of the comprehensive plan;

(2) to provide an alternative approach to conventional flatland development by allowing transfer of residential densities through clustering of dwellings in order to preserve larger areas of open space;

(3) to minimize scarring and disturbances of the natural character of the Mountain Development Area through control of grading and cut/fill operations as defined in the Grading Ordinance;

(4) to control water runoff and soil erosion;

(5) to provide a safe means of ingress and egress for vehicular and pedestrian traffic to and within the Mountain Development Area; and

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[2] This ordinance is reprinted as Appendix D of the Petition for Writ of Certiorari.

(6) to encourage sound engineering practices related to mountain development.

On January 14, 1986, the City Council rezoned all property within the MDA to PMD, except for those properties that fell within an exemption, (Pl.Exh. 2, Ord. No. 8561). The majority of Madero Hills was zoned PMD; however, a portion of Unit One remains R-3, (SF 800-802, 811-813, 1262-1263). Madero Hills was one of several hundred properties rezoned to PMD on January 14, (SF 1351, 1255).

Under the PMD Ordinance, the density of development is related, in part, to slope of the land, (Appendix D, PMD Ord. §§ 25-24.8, -24.9, -24.10). Madero Hills has an average slope of forty-eight (48%) percent, (Pl.Exh. 90; SF 457). Under the PMD and R-3 zoning, Madero can develop up to 26 single family residential units on the property without obtaining variances, (SF 1243, 1260-1265). In addition, the PMD Ordinance authorizes, as uses permitted by right, multiple-family and duplex residential development and recreational facilities, (Appendix D, PMD Ord. § 25-24.4; SF 1185). The ordinance further authorizes by special permit other uses, such as resort lodging, retail shopping facilities and theaters, (Appendix D, PMD Ord. § 25-24.7; SF 1185). Madero did not make application for any use under the PMD regulations, nor did Madero make application for a variance or special permit to the Zoning Board of Adjustment, (SF 830-831; City's Bill of Exceptions, Exh. B, City Code §§ 2.16.010 *et seq.*, Vol. IV, Tr. 1381-1383 (Addendum B); Exh. E, Vol. IV, Tr. 1583-1588).

Instead, Madero directly filed suit in the United States District Court for the Western District of Texas, alleging that the rezoning of Madero Hills constituted a taking of their property without just compensation. In late December, 1988, the federal District Court dismissed Madero's suit as unripe. Specifically, the court ruled that Madero had failed to utilize either the variance procedures authorized by state and local laws or the state court procedures for just compensation.

Less than a month later, Madero filed essentially the same action in state court, without returning to the City to process the application under the PMD Ordinance or to seek a variance from the PMD Ordinance. Madero was successful at trial, but the judgment was reversed by the Texas Court of Appeals on grounds of ripeness.

B. Misstatements of Fact in Petitioners' Statement of the Case

In addition to omitting pertinent facts, Petitioners' Statement of the Case contains factual inaccuracies and argumentative conclusions which require a response.

1. On pages 4 and 5 of the Petition, Petitioners allege that Unit One of Madero Hills was subjected to unusual and impossible conditions. In fact, the approval of Unit One was subject only to standard development conditions, imposed by Respondents for health and safety reasons. (Pl.Exh. 30; Def.Exh. 29; SF 346-347, 682-683). Petitioners adduced no evidence at trial to prove that these conditions were either out of the ordinary or impossible to meet.

2. On page 5, Petitioners argue that the approval of Unit One was wrongfully terminated. Respondents rescinded their approval of Unit One due to Petitioners' inaction on the project for over a year and their failure to meet the conditions imposed upon that approval. Moreover, Petitioners failed to record a final plat with the El Paso County Clerk, as required by state and local law. (Pl.Exh. 84, SF 809, 1035-1036, 1316-1318, 1391-1392, 1423-1424, 1475).

3. The statement on page 6 that "[i]t was not economically feasible to subdivide Madero Hills into only eleven lots" is merely Petitioners' legal opinion. Given that Petitioners never attempted to develop their property under the PMD Ordinance, this conclusion has no basis in fact or law. (SF 830-831; City's Bill of Exceptions, Exh. B, City Code §§ 2.16.010 *et seq.*, Vol. IV. Tr. 1381-1383 (Addendum B); Exh. E, Vol. IV. Tr. 1583-1588).

4. Contrary to the misstatement on page 6, Petitioners failed to present any competent evidence of futility. The testimony of certain city council members was ruled to be incompetent evidence by the Texas Court of Appeals. Moreover, Petitioners' claim that the Zoning Board of Adjustment is powerless to grant Petitioners a variance is a legal conclusion rejected by the Texas Court of Appeals.

SUMMARY OF ARGUMENT

There are no grounds on which to accept review of the state court decision, based on the following points:

1. The Texas Court of Appeals' disposition of this case on grounds of ripeness was premised upon Article I, Section 17, of the Texas Constitution. No federal or state taking claim is mature because an adequate state compensation remedy exists under the Texas Constitution and Petitioners were free to pursue such remedy and totally failed to do so.

2. Even if the Texas Court of Appeals reached the federal ripeness issue concerning the availability of local remedies, the court correctly applied the federal ripeness doctrine.

3. Ripeness of an as applied regulatory taking claim goes to the subject matter jurisdiction of the court, both under state law and federal law. No taking claim accrues until such ripeness requirements are satisfied.

4. This case presents no occasion for the Supreme Court to reconsider the futility exception to the ripeness doctrine.

ARGUMENT

I. PETITIONERS WAIVED ANY CHALLENGE TO THE FACIAL VALIDITY OF THE REGULATIONS

Petitioners pleaded and tried this case solely as an *as applied* regulatory taking claim. Petitioners expressly waived any challenge to the *facial* validity of the Planned Mountain Development regulations as expressly acknowledged by their appellate brief:

> (1) Appellees filed this inverse condemnation action alleging, among other things, that

> the PMD Zoning Ordinance, *as applied* to Madero Hills, constituted a taking without compensation in violation of the Texas Constitution, Article 1, Section 17, and the Fifth and Fourteenth Amendments of the United States Constitution. (Petitioners' Brief to Texas Court of Appeals, June 15, 1990, page XI);
>
> (2) The trial court expressly found that the *application* of the PMD to Appellees property constituted a compensable "taking." The jury in this case also found that a "taking" had occurred. *Appellants' arguments* under this point of error concerning *a facial attack of the PMD Zoning Ordinance are not before this Court.* (emphasis supplied). Petitioners' Brief to Texas Court of Appeals, June 15, 1990, page 29).

The Texas Court of Appeals disposed of Petitioners' claim for want of subject matter jurisdiction under Article I, Section 17, of the Texas Constitution (the taking clause).

Unlike *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 398 (1926), this case does not involve issues concerning the facial or general validity of the PMD regulations or their relationship to public health and safety, as in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). Such matters were conceded during trial. Consequently, the Texas Court of Appeals reviewed only an "as applied" regulatory taking claim in reaching its decision.

II. BECAUSE A STATE CONSTITUTIONAL REMEDY IS AVAILABLE, PETITIONERS' FEDERAL TAKING CLAIM HAS NOT MATURED.

In *Madero Development and Constr. Co., Inc. v. City of El Paso*, No. EP-86-CA-403, slip op. (W.D.Tex. Dec. 21, 1988) (Appendix at p.1-a), the United States District Court for the Western District of Texas granted the City of El Paso's motion for summary judgment dismissing Petitioners' claims as unripe. The court held that Madero had failed to obtain a final decision from the City applying its Planned Mountain Development Ordinance to Madero's land. The court further held that Madero had adequate state remedies available. Accordingly, both prongs of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) were applied to Madero. Instead of filing an appeal of the District Court's holding or seeking a variance from the City, Madero instead filed a damages action in state court. In the litigation that followed, the Texas Court of Appeals held, under Texas law, that a variance was available to Petitioners and, again under Texas law, that Madero's claims were unripe under Article I, Section 17, of the Texas Constitution. As with Madero's federal action, its state claim was dismissed without prejudice.

Madero failed to file an appeal of the District Court's decision which, as a matter of *federal* law, was due within 30 days after the decision. F.R.App.P. 4(a)(1). As discussed above, the Texas Court of Appeals determined, as a matter of *state* law, that Madero's claim for just compensation was premature. The state court determination as to Madero's claims under the Texas Constitution is purely a

matter of state constitutional law, unreviewable by this Court. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986) ("[W]e have no authority to review state determinations of purely state law."); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."); *Payton v. New York*, 445 U.S. 573, 600 (1980) ("[B]y invoking a state constitutional provision, a state court immunizes its decision from review by this Court.").

Moreover, this state court determination of its own jurisdiction does not alter the fact that Texas law provides an adequate monetary remedy in the event that state land use regulations constitute a taking. *See Samaad v. City of Dallas*, 940 F.2d 925, 935-36 (5th Cir. 1991); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978); *City of Abilene v. Downs*, 367 S.W.2d 153, 159 (Tex. 1963). Following this Court's ruling in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), all state courts must obviously provide monetary relief for temporary takings. *See Schnuck v. City of Santa Monica*, 935 F.2d 171, 173 (9th Cir. 1991).

Because the State of Texas provides an adequate process for obtaining just compensation, there can be no taking under the Fifth Amendment unless and until the landowner has appropriately utilized the state's procedures for obtaining just compensation. *Williamson County*, 473 U.S. at 194-97. In *Williamson County*, this Court explained that the Fifth Amendment does not require that "just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for

obtaining compensation' exist at the time of taking." 473 U.S. at 194. Thus, as a matter of law, "no constitutional violation occurs until just compensation has been denied [by the state]." 473 U.S. at 194 n.13. *See also Biddison v. City of Chicago*, 921 F.2d 724, 729 (7th Cir. 1991) ("His federal claim will ripen . . . if and when Biddison is denied just compensation by the state courts."); *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991)("In the instant case, the plaintiffs have pending under Wyoming law an inverse condemnation action to recover compensation for the loss of their homes. . . . Because the plaintiffs have not yet been turned away empty-handed, it is not clear whether their property has been taken without just compensation."); *see also Suess Builders Co. v. City of Beaverton*, 295 Or. 254, 656 P.2d 306 (1982). As the District Court resolved herein, as a matter of federal law, Madero's takings claim is not ripe at this time.

The Texas Court of Appeals dismissed Madero's claims because, as a matter of state law, the trial court lacked subject matter jurisdiction. Specifically, the court held that because Madero failed to apply for a variance from the PMD Ordinance, its inverse condemnation claims are not ripe, and under Texas law ripeness goes to a court's subject matter jurisdiction. *City of El Paso v. Madero Development*, 803 S.W.2d 396, 399-400 (Tex. Ct. App. 1991).

While the court relied on certain opinions of this Court regarding the ripeness issue in inverse condemnation cases, in determining the ultimate issue of subject matter jurisdiction the court relied exclusively on Texas state opinions. Thus, in citing federal opinions, the court relied on them not as binding precedents on the state law

issue, but as guidance in the same way the court might rely on the opinion of another state court. Nothing in the opinion suggests that the Texas court dismissed Madero's cause because it "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Michigan v. Long*, 463 U.S. at 1044 (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)). *See also Minnesota v. National Tea Co.*, 309 U.S. 551, 556 (1940)("It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution. If that were true, we would have no jurisdiction to review.")

Under principles of federalism and comity, it has long been understood that states are free to control and define the jurisdiction of their courts without interference from federal law. Even in cases where federal claims are present, federal law does not "enlarge or regulate the jurisdiction of state courts, or . . . control or affect their modes of procedure." *Howlett v. Rose*, 110 S. Ct. 2430, 2441 (1990) (quoting *Mondou v. New York, N.H.&H. R.R. Co.*, 223 U.S. 1, 56 (1912)).

III. A DEVELOPMENT APPLICATION AND FINAL DECISION ARE REQUIRED.

The decision of the Texas Court of Appeals is entirely consistent with the decisions of this Court relating to ripeness. The court correctly declined to analyze the economic effect of the City's zoning legislation on the basis

of hypothetical plans which were never presented to the City.

As appears from the record, Petitioners had no pending development application on file with the City when the Planned Mountain Development Ordinance was enacted. Petitioners never submitted any development application, much less a request for a variance or change in zoning classification, following the adoption of the PMD Ordinance. In fact, the only development application which was ever finalized on the property was for the first phase of a subdivision for approximately three percent of the development site. Even this approval lapsed for the Petitioners' failure to satisfy reasonable conditions prior to the rezoning.

The court did not rely upon this ground, however, in disposing of Petitioners' claim. Rather, the court held that a variance procedure was available under Texas law and under local ordinance by which Petitioners could obtain relief from the PMD regulations. This holding, which is based entirely on state law, must be given great respect by this Court. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 n.8 (1986); *Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6, 262 (1980). In the complete absence of a variance request and any development application, the court refused to entertain Petitioners' arguments that the El Paso Zoning Board of Adjustment could not grant a variance in harmony with the PMD Ordinance, stating:

> There is then, a question of degree in determining whether a particular variance would violate the spirit of the zoning laws. Some number of density of lots over eleven may or may not [be authorized], and that must be determined by the

> zoning board of adjustment acting within its guidelines. After this degree is attained, the degree of taking can be arrived at. These degrees not only affect whether there is a taking but are relevant to the market value of the property for the purposes of establishing damages, if there is a taking.

City of El Paso, 803 S.W.2d at 401.

As recognized by the Texas Court of Appeals, this fact pattern is precisely the reason why federal courts fashioned ripeness requirements for regulatory taking claims. The facts in this case present familiar ground, which this Court and the lower courts have considered and mandated that a development application and attempts to obtain administrative relief from otherwise harsh impacts are necessary prerequisites to review of claims based upon the Just Compensation Clause of the Fifth Amendment.

IV. EVEN IF THE COURT OF APPEALS REACHED THE FEDERAL RIPENESS QUESTION, IT CORRECTLY RULED THAT RIPENESS IN THE CONTEXT OF AN AS APPLIED REGULATORY TAKING CLAIM IS JURISDICTIONAL UNDER FEDERAL LAW. NO TAKING CLAIM ACCRUES UNTIL RIPENESS REQUIREMENTS ARE SATISFIED.

A. Ripeness goes to Article III case or controversy.

This Court has unequivocally held that a development application and a request for a variance or other

form of administrative relief normally are essential prerequisites to judicial review of an as applied regulatory taking claim premised on the Fifth Amendment of the United States Constitution. *MacDonald*, 477 U.S. at 351; *Williamson County*, 473 U.S. at 194; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *Agins*, 447 U.S. at 261. The Court also has determined that there can be no as applied regulatory taking claim as long as there is a "reasonable, certain and adequate provision for obtaining compensation at the time of the taking." *Williamson County*, 473 U.S. at 194.

It is undeniable that Article III requires a plaintiff to present a ripe controversy. *O'Shea v. Littleton*, 414 U.S. 488 (1974). In *Agins*, plaintiff's failure to submit a development application under the zoning ordinance in question left plaintiff's as applied takings challenge premature for lack of a "concrete controversy." 447 U.S. at 260. In *Williamson County*, plaintiff's failure to seek a variance left it "impossible for the jury to find, on this record, whether respondent 'will be unable to derive economic benefit' from the land." 473 U.S. at 172. Moreover, the Court determined that until a landowner seeks compensation through state procedures, it cannot be said that the state has violated the Just Compensation Clause of the Fifth Amendment: "Thus, the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.' " 473 U.S. at 172. *See also Preseault v. Interstate Commerce Comm'n*, 110 S. Ct. 914 (1990); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (taking claim against the Federal Government premature until landowner has sought compensation under the Tucker Act).

In *MacDonald*, the Court explained:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.

477 U.S. at 348.

Likewise, in *Hodel*, the Court found plaintiff's takings challenge unripe because it had failed to utilize the administrative remedies available to obtain relief from the operation of the statute in question and because plaintiffs had failed to identify "any property in which appellees have an interest that has allegedly been taken by operation of the Act." 452 U.S. at 294. Given these facts, the Court concluded that the case "presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land." 452 U.S. at 295. *See also Pennell v. City of San Jose*, 485 U.S. 1 (1988).

A synthesis of these opinions plainly shows that the Court rejected the takings claim in these cases because the plaintiffs were unable to demonstrate that they had been injured in fact by the local government. In other words, absent a final decision from the local government and an unsuccessful attempt to gain administrative relief therefrom, it is impossible to say that there has been a taking, *i.e.*, an injury redressable under the Fifth Amendment. And, until a landowner has unsuccessfully sought compensation through state courts, the property owner

cannot as a matter of law claim a violation of the Fifth Amendment; no such violation has occurred at that point. In sum, until the requirements of *Agins*, *MacDonald* and *Williamson County* are satisfied, as a matter of law a landowner cannot demonstrate that his Fifth Amendment rights have been violated.

Petitioners would have the Court hold that the mere legislative enactment of a zoning ordinance renders the controversy concrete as to the regulation's economic impact on the landowner's use of the property. This proposition was fully explored and rejected in *Williamson County*, *MacDonald* and *Keystone Bituminous*, and does not require reexamination in this case.

Such a view is totally inconsistent with the nature of the development process. Zoning constitutes only the initial step in development of property and, hence, realization of economic return. The nature of the use and the intensity of development on the property cannot be determined until an application for a development permit of some kind has been acted upon. Hence, the Court's requirement that a development application be submitted pursuant to the allegedly offending zoning regulations goes to the concreteness of the controversy, not to prudential considerations. Further, under all state zoning enabling acts, a variance procedure has been incorporated in the very fabric of the authorization for zoning. A variance is not an extraordinary remedy, but is part and parcel of the process of deciding the permissible use and intensity of use of land.

This Court's rulings on finality precisely apprehend the nature of the development process under local zoning

laws. As this Court long has recognized, regulatory takings are fundamentally different from physical takings, in that the police power actions of local governments constitute only a restraint on the use of the property consistent with the notion of "reciprocity of advantage." *Keystone*, 480 U.S. at 488-93. This Court has ruled that a property owner must at least proceed through the normal development process before the effect of the actions of local government officials can be ascertained. Such a standard goes directly to the case or controversy requirement under Article III.

The Texas Court of Appeals followed this reasoning, stating:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.

City of El Paso, 803 S.W.2d at 400.

Nor is there any reason to examine the application by lower federal courts of this Court's ripeness guidelines. The circuits consistently and correctly hold that ripeness goes to subject matter jurisdiction. *See, e.g., Biddison v. City of Chicago*, 921 F.2d 724, 726 (7th Cir. 1991); *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991); *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990).

B. The decision in *First English* had no effect on jurisdictional prerequisites of a taking claim.

Petitioners assert that the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), impliedly overruled this Court's decisions on ripeness issues. Petitioners argue that the Court's ruling on the availability of compensation for temporary regulatory taking claims affected its previous rulings on ripeness, necessitating further clarification by this Court.

The *First English* decision addressed only the question of the availability of compensation in the event that a regulatory taking under the Fifth Amendment is actually found. The decision presumed that a taking already had occurred, due to the unique posture of the case, and did not question whether the controversy was ripe for review. 482 U.S. at 311-13. *First English* neither abrogates nor in any way alters the Court's previous decisions on ripeness and has no bearing on this case.

C. If an Article III case or controversy does not exist, prudential considerations are irrelevant.

Petitioners argue that the Texas Court of Appeals, together with many other lower federal and state courts, have misapprehended the federal ripeness doctrine. In particular, Petitioners assert that the controlling case is *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), in which the Court held that the ripeness doctrine is

founded both on Article III case or controversy requirements and on certain prudential considerations. Petitioners falsely reason that reviewing courts are required to examine prudential factors, such as the relative hardship to the parties, in every ripeness claim.

It is ironic that Petitioners claim that the ripeness of their claim should be evaluated under the prudential considerations of *Abbott Laboratories* instead of the case or controversy requirement of Article III, because these prudential considerations enlarge the grounds for dismissing cases. *See Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) ("This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form.' *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947)."); *Poe v. Ullman*, 367 U.S. 497, 502 (1961) ("The restriction of our jurisdiction to cases and controversies within the meaning of Article III of the Constitution . . . is not the sole limitation on the exercise of our appellate powers, especially in cases raising constitutional questions."); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1935) (Brandeis, J., concurring) ("The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."); *Molins PLC v. Quigg*, 837 F.2d 1064, 1068 (Fed. Cir. 1988) ("A case or controversy may be constitutionally ripe for review but that does not automatically invoke review. Prudential considerations must also be satisfied.").

No amount of prudential considerations can ever expand the subject matter jurisdiction of federal courts to render advisory opinions where Article III case or controversy requirements are not met. The Texas Court of Appeals unequivocally ruled that in the context of an as applied regulatory taking claim ripeness goes to the subject matter jurisdiction of the case. Consequently, prudential considerations have no bearing on whether the court has jurisdiction.

V. THERE IS NO CONFLICT BETWEEN FEDERAL RIPENESS RULINGS AND EXHAUSTION OF REMEDIES DOCTRINE.

Petitioners assert that the Court must clarify the relationship between exhaustion of administrative remedies and ripeness in the context of taking claims, due to confusion by lower courts in applying those doctrines. In *Williamson County*, the Court instructed that satisfaction of ripeness principles was a necessary prerequisite to consideration of as applied regulatory taking claims, but that exhaustion of administrative remedies was not. The Court clearly established that the requirements of a development application and petition for variance fell within the ripeness doctrine, not under the exhaustion of administrative remedies doctrine.[3] 473 U.S. at 192-94.

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[3] It is immaterial, of course, whether state courts classify such requirements as components of ripeness or exhaustion of administrative remedies; it is not the label, but the availability of alternative sources of relief, which determines whether a court should exercise jurisdiction over the controversy.

The difference between these doctrines, as exhaustively explored in *Williamson County*, grows out of the Court's rulings that exhaustion of administrative remedies is not a prerequisite to bringing a Section 1983 claim. In the context of civil rights claims, the exhaustion of remedies doctrine generally applies to agency procedures which challenge the validity of a final decision by the agency after the unconstitutional deprivation has already occurred. *See Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). As stated in *Williamson County*, "the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if a decision is found to be unlawful or otherwise inappropriate." 473 U.S. at 193.

The variance procedure, classified as an element of the ripeness doctrine in *Williamson County*, is not a procedure to evaluate the validity of zoning regulations or to appeal zoning decisions. To the contrary, the variance procedure is part and parcel of the normal statutory scheme for determining the type and intensity of use permitted on property in the face of alleged hardship to the applicant. Thus variance, special use and rezoning applications are necessary to determine the ultimate economic impact and the character of the regulation – two of the "essentially ad hoc, factual inquiries" that make up takings analysis. *MacDonald*, 473 U.S. at 349.

The guidelines established in *Williamson County* for differentiating between procedures which fall under the ripeness doctrine and those which fall under the exhaustion of remedies doctrine are clear. Lower courts have no

problems applying such procedures. This case presents no occasion for reconsidering the guidelines.

VI. THIS CASE PRESENTS NO OCCASION FOR THE SUPREME COURT TO RECONSIDER THE FUTILITY EXCEPTION TO THE RIPENESS DOCTRINE ANNOUNCED IN *MACDONALD*.

Petitioners assert that this Court should reexamine and clarify its futility "exception" to ripeness requirements. In *McDonald*, this Court decided that, under extraordinary circumstances, the property owner could be excused from complying with ripeness requirements by demonstrating that it would be futile to proceed with a development application or variance request; bare allegations of futility would not, however, suffice to establish futility.

The Court of Appeals correctly disposed of Petitioners' contentions that development applications and variance requests were futile due to statements of particular legislators about the enactment of the PMD regulations. Under both state and federal law, the subjective intent of individual legislators is incompetent evidence by which to establish the intent of the City in the enactment of land use regulations. *Regan v. Wald*, 468 U.S. 222 (1984); *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex. Ct. App. 1989).

The state court conclusively determined that the variance remedy was available in order to obtain relief from the allegedly harsh effects of local zoning regulations. The decision of the Texas Court of Appeals as to the availability of the local remedy is one purely of state law not subject to review by this Court.

Contrary to Petitioners' assertions, lower courts have followed the Court's outline of the futility exception in formulating reasonable rules for determining whether a property owner should be excused from finality requirements. It is true, as Petitioners assert, that some courts have found that futility simply may not be established in the absence of at least one development application. This logic is premised upon the same reasoning that underlies the ripeness doctrine: avoidance of premature speculation on the type and extent of development that would be allowed under local regulations.

Lower courts have established futility exceptions on a number of grounds, including (1) unavailability of variance procedure (*Beure-Co. v. United States*, 16 Cl. Ct. 42 (1988); *Formanek v. United States*, 18 Cl. Ct. 785 (1989)); (2) ground for denial of application was not compatible with subsequent development application (*Ciampetti v. United States*, 18 Cl. Ct. 548 (1989)); (3) submission of multiple applications unnecessary (*de St. Aubin v. Flacke*, 68 N.Y.2d 66, 505 N.Y.S.2d 859, 496 N.E.2d 879 (1986)); (4) legislative action such as enactment of a moratorium precluded the proposed use of the property (*Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987)); and (5) rezoning of property precluded use for which development application was filed (*Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989)). None of these situations is even remotely present in this case.

CONCLUSION

The Texas Court of Appeals disposed of Petitioners' taking claim on state constitutional grounds. Because a

state constitutional remedy exists, a federal claim has not matured. Petitioners are free to pursue the compensation remedy under the Texas Constitution by taking the two steps necessary under state law to perfect their as applied taking claim: (1) submitting a development application under the challenged regulations; and (2) seeking a variance.

Even if the Court of Appeals reached the federal ripeness issue, the court correctly applied federal law. This case presents no extraordinary facts which would form the basis for a different direction in federal jurisprudence on the taking question. Nor have Petitioners pointed out any conflict among federal circuits in applying the ripeness doctrine outlined by this Court over the last decade. In fact, Petitioners concede that both federal and state lower courts uniformly apply ripeness principles to dispose of premature as applied taking claims, although the result is not to the Petitioners' liking. Petitioners have presented no grounds for review of the decision of the Texas Court of Appeals.

For these reasons, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MADERO DEVELOPMENT AND CONSTRUCTION COMPANY, INC., a Texas Corporation, and CHAPARRAL EQUITY CORPORATION, a Texas Corporation,	)	No. EP-86-CA-403
Plaintiffs,	)	
v.	)	
CITY OF EL PASO, TEXAS, a Municipal Corporation, and CITY PLAN COMMISSION,	)	
Defendants.	)	

ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

This is an action for damages and other relief under 42 U.S.C. §§ 1983 and 1985 and the Fourteenth Amendment to the Constitution of the United States. The Plaintiffs also ask the Court to accept pendent jurisdiction over a claim pursuant to Article 1, § 17, of the Texas Constitution. Both parties have filed motions for summary judgment. The Defendants have also filed a motion for leave to file an amended answer, which the Plaintiffs oppose.

The facts are relatively undisputed. In 1979, Chaparral Equity Corporation, one of the Plaintiffs herein, sold a thirty-acre tract of land to one Rogelio Madero. Madero later conveyed the land to the other Plaintiff, Madero

Development and Construction Company, Inc. In September, 1980, Madero Development filed an application with the City for preliminary approval of a 1.8 acre subdivision to be built on the same tract of land, now known as "Madero Hills". Madero Development also requested a change of zoning from the City Plan Commission. The Commission deferred decision on the subdivision application and requested that Madero submit a master plan for the entire Madero Hills development. The Commission also denied the request of Madero Development for a zoning change from R-3/R-4 (high density residential) to SD (a special zoning category), recommending instead that Madero Hills be rezoned RMD (residential mountain district), a zoning classification that severely limited development. In December, 1984, the El Paso City Council passed an ordinance amending the RMD ordinance and changing its name to PMD (planned mountain district), a zoning classification with similarly strict limitations on development. In January, 1986, the City Council rezoned the Madero Hills property from R-3/R-4 to PMD. Under PMD zoning, the allowable density of development on a tract of land is tied to its percentage of slope. According to the City's method of calculation, the Madero Hills property had a slope of forty-eight percent. Therefore, under this zoning classification only twelve units could be built on the property, compared with 179 units under the previous R-3/R-4 zoning classification. The Plaintiffs have not sought a variance or special exception from the City Plan Commission or the Zoning Board of Adjustment to enable the property to be developed as previously planned, nor has either Plaintiff formally requested that the City Plan Commission or the City Council rezone

the property. Instead, they brought this action claiming that the Defendants have taken their property without just compensation and have denied them due process of law and equal protection of the law. They have filed a motion for summary judgment with respect to these claims. The Defendants have filed a motion for leave to file an amended answer, which the Plaintiffs oppose. The Defendants also seek summary judgment in their favor, contending that (1) Plaintiffs' claims are not ripe for review in federal court; (2) that the Plaintiffs lack standing to protest the City's zoning of the property, and (3) that even if the question were ripe and the Plaintiffs did have standing, they have not shown that the City's action constitutes a deprivation of their constitutional rights.

The Defendants' answer was filed on December 22, 1986. Paragraph 4 of that original answer read in its entirety as follows:

> Defendants [sic] admit the first sentence of paragraph Four of County I of Plaintiffs' Original Petition.[1] Defendants admit the remaining allegations of paragraph Four of Count I of Plaintiffs' Original Petition.

The Defendants claim that the second "admit" in this paragraph was a clerical error; it should have read "denied". They move to amend the answer to clear this up. The Court finds that leave to amend should be granted. It is well settled that leave to amend pleadings should be "freely given when justice so requires". Rule

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[1] The Plaintiffs labeled their pleading a "Petition" instead of a complaint as prescribed by Rule 3, Federal Rules of Civil Procedure.

15(a), Federal Rules of Civil Procedure. It is obvious from the history of this case that the "admission" was a clerical error which did not reflect the position of the Defendants. Furthermore, it must have been obvious to the Plaintiffs from the beginning that the Defendants' "admission" was unintentional. The parties pursued extensive discovery for over a year, and no one could have doubted that the merits of this case were being hotly contested, nor have believed that the Defendants intended to concede that their zoning action was "an arbitrary, unreasonable, exclusionary, and illegal act by the municipality" (Plaintiffs' Original Petition, paragraph Four, page 3). Furthermore, the parties have filed a joint pretrial order which was approved by the Court. The pretrial order clearly sets forth the Defendants' denial that the City's zoning actions on the Madero Hills property violated any of Plaintiffs, constitutional rights. A properly approved pretrial order supersedes all previous pleadings in the case. Defendants' motion for leave to amend should be granted, therefore, because it would bring the pleadings in line with the parties' common understanding of the contested issues in the case.

The Defendants have moved for summary judgment in their favor with respect to the Plaintiffs' claims under Section 1983, contending that the case is not ripe for review because the Plaintiffs have failed to obtain a final decision on the zoning in question. Of course, the exhaustion of administrative remedies is not a prerequisite to a suit under Section 1983. *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). Nevertheless, an administrative action must be final before it is judicially reviewable.

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985). An action is not "final" unless the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra* at 193-94. Furthermore, when a party alleges that his property has been taken without just compensation in violation of the Fifth and Fourteenth Amendments, he must show that he has pursued the recovery of just compensation in the state courts and that recovery has been denied. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra,* at 195-96. The Constitution does not require that taking and compensation be simultaneous; it only requires a reasonable, certain and adequate provision for obtaining compensation. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra* at 195; *Regional Rail Reorganization Act cases,* 419 U.S. 102, 124-25 (1974); *Cherokee Nation v. Southern Kansas Railroad Co.,* 135 U.S. 641, 659 (1890). Like the instant case, *Williamson County* involved claims under both the Due Process Clause and the Just Compensation Clause, and the Supreme Court held that both were premature.

Plaintiffs argue that the instant case is distinguishable from *Williamson County,* because that holding was dependent upon the existence of procedures under state and local law for seeking an exemption from the zoning ordinance. They contend that the Defendants in this case have failed to show the availability of variances or special exemptions which would provide relief from the density restrictions of the PMD zoning. With respect to the claim

under the Just Compensation Clause, the Plaintiffs deny the existence of an "inverse condemnation" action in Texas comparable to the one in Tennessee upon which the Supreme Court relied.

With respect to the finality question, it is unclear under Texas law as to whether the Madero Hills zoning decision is "final". Under the El Paso City Code, the Zoning Board of Adjustment has authority to hear appeals and applications for variances and special exceptions. *El Paso City Code*, § 20.04.050. Furthermore, the City Code provides that "the board shall have the powers granted by, and be controlled by, Article 1101g, Rev. Civ. Stat. of Texas, as amended." The statute to which the City Code refers has been codified in the Texas Local Government Code. It provides in pertinent part:

> The governing body [the City Council] may authorize the Board of Adjustment, in appropriate cases and subject to appropriate conditions and safeguards, to make special exceptions to the terms of the zoning ordinance that are consistent with the general purpose and intent of the ordinance and in accordance with any applicable rules contained in the ordinance.

Texas Local Government Code, § 211.008(a) (Vernon 1988). Boards of adjustment are also empowered to grant variances from the terms of zoning ordinances:

> [I]f the ordinance is not contrary to the public interest, and due to a special condition, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done.

Texas Local Government Code, § 211.009(3) (Vernon 1988). Furthermore, the Code provides that a decision of the Zoning Board of Adjustment may be reviewed by a state district court. In the instant case, there is no indication that the Plaintiffs have sought a variance from the Zoning Board of Adjustment, the City Plan Commission, or the City Council. Although the Plaintiffs suggest that such a request would have been futile, they have cited no case law in support of a "futility" exception to the ripeness and finality requirement imposed by the Supreme Court.

Even if the availability of relief from the Zoning Board of Adjustment is uncertain, the Plaintiffs clearly had the right to seek relief in state court. Texas law recognizes a judicial remedy for a property owner aggrieved by an arbitrary and unreasonable zoning action by a city. *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971); *City of Austin v. Nelson*, 45 S.W.2d 692 (Tex. Civ. App. – Austin 1931, no writ). Property owners also have recourse to the Texas courts if a zoning board of adjustment arbitrarily grants or denies variances that restrict the use of or affect their property. *Board of Adjustment v. Willie*, 511 S.W.2d 591 (Tex.Civ.App. – San Antonio 1974, writ ref'd n.r.e.); *Swain v. Board of Adjustment of the City of University Park*, 433 S.W.2d 727 (Tex.Civ.App. – Dallas 1968, writ dsm'd w.o.j.), *cert denied*, 396 U.S. 277 (1970).

The Plaintiffs challenge the continuing viability of the *Williamson County* ripeness requirement in light of the Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,

___ U.S. ___, 107 S.Ct. 2378 (1987). The Court finds that holding not inconsistent with *Williamson County*. In *First English Evangelical Lutheran Church*, the plaintiff had alleged a taking without just compensation and had filed suit in California state court. The matter had been litigated all the way to the Supreme Court of California, and came to the United States Supreme Court by means of direct appeal. Surely the ripeness requirement was satisfied in that case, whereas in the instant case it has not been satisfied. The Plaintiffs must take their grievance to state court and seek just compensation for the alleged "taking" before bringing suit in this Court under Section 1983.

Finally, the Plaintiffs have failed to state a claim for relief under 42 U.S.C. § 1985(3). The statute now codified as 42 U.S.C. § 1985(3) was originally enacted by Congress as part of the Ku Klux Klan Act of 1871. Its purpose was to protect emancipated blacks and their supporters from conspiracies to deprive them of their civil rights. *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. 825, 835-37 (1983). In order to state a claim under Section 1985(3), the plaintiff's complaint must allege a conspiracy motivated by race-based invidiously discriminatory animus. *United Brotherhood of Carpenters and Joiners v. Scott, supra; Griffin v. Breckenridge*, 403 U.S. 88 (1971). No such allegations are made in the instant case, and no claim under Section 1985(3) has been stated.

In light of the foregoing discussion, the following orders should be entered.

It is ORDERED that the Defendants' motion for leave to file and amended answer in the above-styled and

numbered cause be, and it is hereby, GRANTED. The District Clerk is directed to file the first amended answer.

It is further ORDERED that the Defendants' motion for summary judgment be, and it is hereby, GRANTED.

It is further ORDERED that the Plaintiffs' claim for relief under 42 U.S.C. § 1983 be, and it is hereby, DISMISSED without prejudice.

It is further ORDERED that the Plaintiffs' claim under 42 U.S.C. § 1985(3) be, and it is hereby, DISMISSED with prejudice.

SIGNED AND ENTERED this 21st day of December, 1988.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE